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A DIGEST OF INDIAN LAW CASES;

CONTAINING

HIGH COURT REPORTS, 1862-1886,

AND

PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA, 1836-1886,

WITH AN INDEX OF CASES.

78567

COMPILED UNDER THE ORDERS OF THE GOVERNMENT OF INDIA

BY

JOSEPH VERE WOODMAN,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE HIGH COURT, CALCUTTA.

IV—B—1A

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HIGH COURT, NORTH-WESTERN PROVINCES, 1866—1886.

CHIEF JUSTICES.

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„ D. Straight.
„ M. Brodhurst.
„ W. Duthoit (D.C.L.) (*Offg.*).
„ W. Tyrrell.
„ Saiyad Mahmud.

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" Lord Denman.
" Lord Langdale.
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" Sir Alexander Johnston, Kt.
" Sir Edward Ryan, Kt.
" Sir Lawrence Peel, Kt.
" Sir James William Colvile, Kt.

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COL. 22.—*Under heading* "ABSENCE BY REASON OF TRANSPORTATION" *for* "LIMITATION ACT, 1877, s. 13" *read* "LIMITATION ACT, 1877, s. 7.".

COL. 153.—*Under heading* "AGENT, AUTHORITY OF" *for* "B. L. R., 195" *read* "5 B. L. R., 195".

COL. 208.—*Case 222, reference, for* "8 B. L. R." *read* "7 B. L. R."

COL. 469.—*Under heading* "BENAMI TRANSACTION" *insert reference,* "*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 19 W. R., 292."

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COL. 773.—*Case 2, under* "s. 138" *for* "3 I. L. R." *read* "3 B. L. R.".

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COL. 1488.—*Case 169, reference, for* "2 W. R., 230" *read* "2 N. W., 230".

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COL. 1588.—*Case 39, reference, for* "10 Moore's I. A." *read* "11 Moore's I. A.", *and for* "W. R., P. C." *read* "9 W. R., P. C".

COL. 1621.—*Under case 202, reference, for* "16 W. R., 471" *read* "14 W. R., 471".

COL. 1785.—*Case 341, reference, before* "11 W. R., P. C." *insert* "2 B. L. R., P. C., 85".

COL. 1856.—*Line 1 from top, after* "EXCISE ACT" *omit* "1856".

COL. 1888.—*Line 8 from top, name of case should be* "BALAJI RANCHODDAS, IN RE."

COL. 2057.—*Line 7 from top, for* "12 W. R., 33" *read* "12 W. R., P. C., 33".

COL. 2066.—*Case 1, reference, for* "5 I. L. R." *read* "5 B. L. R."

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COL. 2103.—*Case 7, reference, for* "Calc." *read* "Bom."

COL. 2221.—*Case 18, reference, omit* "16 W. R., 142".

COL. 2306.—*Case 145, reference, for* "12 B. L. R." *read* "14 B. L. R.", *and for* "29 W. R., 490" *read* "22 W. R., 496".

COL. 2538.—*Line 7 from top, for* "7 Bom." *read* "1 Bom."

COL. 2559.—*Case 73, immediately before name of case insert* "Held also that the trust for maintenance and the religious trusts, as being mere perpetual trusts for the benefit of the family, were likewise void."

COL. 2768.—*Case 21, reference, for* "6 B. L. R." *read* "4 B. L. R."

COL. 2772.—*Under case 15, reference, for* "2 W. R., 142" *read* "2 N. W., 142".

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COL. 3102.—*Line 13 from top, reference, for* "3 All." *read* "2 Mad."

COL. 3112.—*Case 3, name of case, for* "HYDER SINGH" *read* "HYDER JUNG BAHADOOR."

COL. 3515.—*Case 167, line 11, after* "89" *insert* "followed."

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COL. 4118.—*Case 1, line 4 of heading, for* "defence" *read* "reference".

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COL. 4615.—*Case 20, reference, for* "2 A. C." *read* "2 B. L. R., A. C."

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COL. 6144.—*Line 13 from top, reference, for* "10 Bom." *read* "9 Bom."

COL. 6240.—*Line 23 from top, reference, after* "2 Moore's I. A., 424" *omit* "6 W. R., P. C., 46".

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1862—1886

AND OF

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8 Bom., A. C., 213

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——— Muhtarafa.—*Trade tax, Zemidar's right to collect.—Mad. Reg. XXV of 1802, s. 4.—Mad. Reg. XXV of 1832.*—The right of collecting the muhtarafa or trade tax from artisans in his zemindari has not been delegated by Government to the Zemindar of Karvaitnagar, and cannot be legally exercised by his assignees. *Quære,*—Whether it was competent for Government to delegate the collection of the muhtarafa to zemindars for their own use. VEDANTA *v.* KANNIYAPPA
[I. L. R., 9 Mad., 14

TAXATION OF BILL OF COSTS.

See ATTORNEY AND CLIENT.
[I. L. R., 3 Calc., 473

See LIMITATION ACT, 1877, ART. 84 (1871, ART. 85) . . I. L. R., 1 Bom., 253
[I. L. R., 7 Mad., 1

1. ——— Attendance before taxing officer.—*Attorney.—Appearance for several parties.—Summons to attend taxation.—Practice.*—Any work which an attorney does jointly for several parties together he can only make one charge for, and where he appears for any number of parties before the taxing officer at the taxation of the costs of a suit, he must be taken to represent them jointly. The taxing officer should not issue separate summonses to different parties who appear by one attorney. KENNY *v.* ADMINISTRATOR GENERAL OF BENGAL . . . . 7 B. L. R., Ap., 50

2. ——— Accountants employed not under order of Court.—*Useful and necessary expense.*—In a suit to set aside a settlement, two accountants were employed at the plaintiff's instance, and not by order of Court, to examine the settlor's books and give evidence. *Held* that the investigation being most useful to the Court, and adapted to the ends of justice, the taxing master was right in allowing their expenses. MACNAIR *v.* HOGG
[2 Hyde, 89

TAZI MANDI CHITTIS.

See CONTRACT—WAGERING CONTRACTS.
[4 Moore's I. A., 339
5 Moore's I. A., 109
6 Moore's I. A., 251

——— Principal and agent.—*Gambling Act (XXI of 1848).*—Where the plaintiff had expended money at the request of the defendant in the purchase or settlement of tazi mandi chittis,—*Held,* he was entitled to recover notwithstanding Act XXI of 1848. KANAYALAL *v.* CHAGMAL BATTIA
[8 B. L. R., 412

BHAIRABNATH KHETTRI *v.* JUMANRAM DHANDARIA . . . 8 B. L. R., 415, note

TEHSILDAR.

See LIMITATION ACT, 1877, ART. 7 (1859, s. 1, CL. 2).
[1 B. L. R., S. N., 20: 10 W. R., 260

TEMPLE, SUIT FOR DECLARATION OF TRUSTS OF—

See ACT XX OF 1863.
[5 B. L. R., Ap., 55

TENANT.

See LANDLORD AND TENANT.

——— Suit against, for share of rent.

See CASES UNDER CO-SHARERS—SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY—KABULIATS.

See CASES UNDER CO-SHARERS—SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY—ENHANCEMENT OF RENT.

See CASES UNDER CO-SHARERS—SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY—RENT.

TENDER.

See BENGAL RENT ACT, 1869, s. 46.
[1 B. L. R., S. N., 7: 10 W. R., 101
16 W. R., 79
2 W. R., Act X, 88

1. ——— Validity of tender.—*Contract Act, s. 38.—Tender of interest on mortgage-debt.*—Under a mortgage-deed taken to secure the repayment within three years of a sum of R16,000 advanced by the plaintiff, with interest at 15 per cent. from the 2nd July 1874, the date of the mortgage, it was stipulated that interest should be paid every six months, but that if a year's interest should be unpaid, then the whole amount due for principal and interest should become payable at once; and also that the mortgagor might, after payment of interest, pay towards satisfaction of the principal any sum not less than R1,000. The first year's interest was allowed to get into arrear, but in September 1875 the defendant went to the plaintiff with R19,000, a greater sum than was due for principal and interest, and told him to repay himself from that sum. The

TENDER.—Liability of tender—*continued.*

offer was refused, and the plaintiff thereupon brought a suit on the 9th July 1877 for R16,000, with interest from the date of the mortgage to the date of the suit and subsequent interest. *Held* that the tender made by the defendant, although not valid according to English law, was valid under section 38 of the Contract Act. *Per* WILSON, *J.*—Section 38 of the Contract Act substantially requires that there should be a genuine and unconditional offer, in case of payment, to pay unconditionally at a proper place, made by a person in a position to pay. KANYE LALL KHAN *v.* KHETTERMONEY DOSSEE
[5 C. L. R., 105

2. ——— *Unconditional tender.—Costs.*—In a suit to recover R1,323-15-6, the balance of the price of goods sold, on which an account had been come to between the parties, it appeared that the defendant had tendered before suit a sum of R1,043-5, stating in the letter of tender that the sum so tendered was the only sum due. At the trial, the plaintiff obtained a decree for the full amount claimed by him. *Held,* both in the Court below and on appeal, that the tender was bad, and therefore the plaintiffs were entitled to their costs. *Held per* KENNEDY, *J.*, that the tender was bad, being a tender of part of an entire debt. *Held per* GARTH, *C. J.* (MARKBY, *J.*, concurring), that the tender was also bad, as the plaintiffs could not have accepted the sum tendered without giving up the remainder of their claim. CHUNDER CAUNT MOOKERJEE *v.* JODOONATH KHAN
[I. L. R., 3 Calc., 468: 1 C. L. R., 470

3. ——— *Agent.—Cheque in payment of debt for rent.—Suit for rent.—Costs.*—The landlord of a house through his agent sent in rent-bills to his lessee. The lessee gave the agent a cheque payable to her attorney for the amount demanded. The attorney realised the amount of the cheque and gave the money to the agent, who tendered it to the landlord's attorney, who refused to accept, and the money was returned to the lessee's attorney. *Held,* in a suit for the rent, that, under the circumstances, the tender amounted to payment. *Held,* further, that although, as a general rule, the amount of a tender not accepted ought to be paid into Court in order to entitle the defendant to costs, yet that, as the tender in this case amounted to payment, the defendant was entitled to have the suit dismissed with costs. BOLYE CHUND SING *v.* MOULARD . . . . I. L. R., 4 Calc., 572

TENURE CREATED UNDER COURT OF WARDS.

See BENGAL ACT IV OF 1870.
[15 B. L. R., 343

TERRITORIAL JURISDICTION, EFFECT OF CESSION ON—

See CESSION OF BRITISH TERRITORY IN INDIA . . I. L. R., 1 Bom., 367
[10 Bom., 37

TERRITORIAL LAW OF BRITISH INDIA.

——— *Nature of territorial law.—English law.*—The territorial law of British India is a modified form of English law. SECRETARY OF STATE *v.* ADMINISTRATOR GENERAL OF BENGAL
[1 B. L. R., O. C., 87

TERRITORY, TRANSFER OF—

——— *District of Kanara.—16 and 17 Vict., c. 95; 21 and 22 Vict., c. 106.—Councils Act, 24 and 25 Vict., c. 67.*—The power given by 16 and 17 Victoria, Cap. 95, to alter the distribution of territories among the presidencies, was vested by 21 and 22 Victoria, Cap. 106, in the Secretary of State for India, by whose order of 28th of February 1862 North Canara was annexed, the new arrangement of territory to take effect from such date as the Governor General of India in Council should by proclamation appoint for the purposes of the Councils Act, 1861, which Act has reference solely to the constitution and functions of the Legislative Councils, and does not purport to affect in any way the exercise of the general powers of Government, or the administration of justice, and the jurisdiction and authority of the Courts of Justice, the annexation for those purposes being made by the Secretary of State, and not being qualified or controlled by the proviso in section 47 of 24 and 25 Victoria clause 67, which cannot be construed as a substantive enactment, or as qualifying or restraining the power vested in the Secretary of State. REG. *v.* VYANKATSVAMI
[2 Bom., 112 : 2nd Ed., 106

TESTATOR.

——— Acknowledgment of signature by—

See WILL—EXECUTION.
[I. L. R., 1 Bom., 547

——— Application for probate of will of Hindu.

See PROBATE—OPPOSITION TO AND REVOCATION OF GRANT.
[I. L. R., 2 Calc., 208

——— Debts of Hindu.

See VENDOR AND PURCHASER—NOTICE.
[I. L. R., 4 Calc., 897

——— Power of—

See CASES UNDER HINDU LAW—WILL—POWER OF DISPOSITION.
[I. L. R., 1 Bom., 561

See MAHOMEDAN LAW—WILL.
[I. L. R., 2 Calc., 184

THAKBUST AWARD.

See ACT XIII OF 1848.
[2 B. L. R., P. C., 111 : 12 W. R., P. C., 6

THEFT.

See PARTNERSHIP PROPERTY.
[13 B. L. R., 307, 308, note; 310, note

THEFT—*continued.*

——— committed out of British territory.

See JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTY IN ONE DISTRICT . I. L. R., 1 Mad., 171

1. ——— Penal Code, s. 378.—*Definition of theft.*—As to what constitutes theft as defined in the Penal Code. QUEEN *v.* MADAREE
[3 W. R., Cr., 2

2. ——— *Moving property and severing it.*—The moving by the same act which effects the severance may constitute a theft. ANONYMOUS . . . . 5 Mad., Ap., 36

3. ——— *Removal of property against wish of ostensible purchaser thereof.—Apparent title or colour of right to property.*—To constitute theft it is sufficient if property is removed against his wish, from the custody of a person who has an apparent title, or even a colour of right, to such property. *Cap*é *v. Scott, L. R., 2 Q. B., 269,* followed. QUEEN-EMPRESS *v.* GANGARAM SANTRAM
[I. L. R., 9 Bom., 135

4. ——— *Giving up right of possession in property by owner.*—A conviction for theft under the Penal Code is illegal if the owner has given up all property in and all possession of the subject of the alleged theft. ANONYMOUS
[4 Mad., Ap., 30

5. ——— *Making away with property lawfully possessed.*—The making away with property of which a person has been put in lawful possession by superior authority is not theft, but criminal breach of trust. QUEEN *v.* BHARUT CHUNDER . . . . . 1 W. R., Cr., 2

6. ——— *Unexplained possession of rice.—Meaning of corpus delicti.*—Where a prisoner was found in possession of rice not thrashed in the usual way, and having no paddy land of his own, he failed to account satisfactorily for his possession of the rice,—*Held*, he could not be convicted of theft without more evidence. The meaning of the term "*corpus delicti*" explained. ANONYMOUS
[7 Mad., Ap., 19

7. ——— *Dishonest taking, Omission of allegation of.*—The prisoner was convicted of theft on his own confession. The charge to which the prisoner pleaded did not allege the taking out of the possession of some person dishonestly, and there was no evidence of such taking. *Held* that the conviction was bad. ANONYMOUS . 5 Mad., Ap., 37

8. ——— *Abetment of theft.—Receiving stolen property.—Joint undivided Hindu family.*—A Hindu, intending to separate himself from his family, emigrated to Demerara as a coolie. After an absence of thirty years he returned to his family, bringing with him money and other moveable property which he had acquired in Demerara by manual labour as a coolie. On his return to his family he lived in commensality with it, but he did

THEFT.—Penal Code, s. 378—*continued.*

not treat such property as joint family property but as his own property. *Held* that such property was his sole property, and his brother was not a joint owner of it, and could properly be convicted of theft in respect of it. It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property. EMPRESS *v.* SITA RAM RAI **[I. L. R., 3 All., 181**

9. ——— *Mahomedan married woman.—Husband and wife.—Taking property of husband.*—A Mahomedan married woman may be convicted of theft, or abetment of theft, in respect of the property of her husband. REG. *v.* KHATABAI **[6 Bom., Cr., 9**

10. ——— *Hindu woman removing stridhan from possession of her husband.*—A Hindu woman who removes from the possession of her husband, and without his consent, her palla or stridhan, cannot be convicted of theft, nor can any person who joins her in removing it be convicted of that offence. REG. *v.* NATHA KALYAN . **8 Bom., Cr., 11**

11. ——— *Removal of family jewels by wife and persons coming to commit adultery with her.*—Two persons were committed for trial, the first prisoner for adultery, enticing away a married woman, and theft, and the second prisoner for abetment of the enticing away and theft. The first prisoner was acquitted of the charges of adultery and enticing away. The case for the prosecution was that the prosecutor's wife left her husband's house in company with the first prisoner, and that previous to her departure she, by means of false keys supplied to her by the second prisoner, opened the room where the family jewels and money were kept and removed them. The jewels were deposited with the second prisoner for safe custody. Part of the money was handed to the first prisoner. *Held* that, notwithstanding the acquittal, the prisoners were not entitled to be discharged without trial on the charge of theft. ANONYMOUS **[5 Mad., Ap., 23**

12. ——— **and s. 114.**—*Forcibly carrying off crop.—Want of consent of owner.*—Where a Court finds that parties came with a number of armed men, and carried off a crop, the finding amounts to that of a forcible carrying off without the consent of the owner. Even if they took no part in the actual taking, they must, with reference to section 114, Penal Code, be considered guilty of the substantive offence under section 378. QUEEN *v.* SHIB CHUNDER MUNDLE . **8 W. R., Cr., 59**

13. ——— *Person acting under ill-founded claim of right.*—A person acting under a claim of right (however ill-founded such claim may be) is not guilty of theft by asserting it. QUEEN *v.* RAM CHURN SINGH . . **7 W. R., Cr., 57**

14. ——— *Assertion of right by accused.—Defence to charge of theft.*—A bare assertion by an accused charged with committing theft of a proprietary right in the alleged stolen property

THEFT.—Penal Code, s. 378—*continued.*

is no reason for a Magistrate to refuse to entertain a charge of theft. QUEEN *v.* KALICHARAN MISSER **[7 B. L. R., Ap., 55**

S. C. RUNNOO SINGH *v.* KALI CHURN MISSER **[16 W. R., Cr., 18**

See KHETTER NATH DUTT *v.* INDRO JALIA **[16 W. R., Cr., 78**

HURIS CHUNDRA DAS *v.* BOLAI AUDHICAREE **[16 W. R., 75**

15. ——— *Plunder of crops.—Assertion of right to crops.*—The mere assertion of a fair claim of property or right, or the mere existence of a doubt as to right, is not sufficient to justify an acquittal in a case of plunder of crops. The claim to the property must be proved by evidence to be fair and good. NASSIB CHOWDRY *v.* NANNOO CHOWDHRY . . . . **15 W. R., Cr., 47**

16. ——— **and s. 442.**—*Boat. Moveable property.*—A boat may be the subject of theft. Although, under section 442 of the Penal Code, it is for certain purposes classed with houses, it does not cease to be moveable property under section 378. QUEEN *v.* MEHAR DOWALIA **[16 W. R., Cr., 63**

17. ——— *Intention to convert to his own use, Want of.—Temporary use.*—When an accused charged with murder was alleged to have taken a boat from a place where it had been secured by its owner, and after proceeding some distance in it had abandoned it, and when he was charged with the theft of the boat,—*Held* that the charge was unsustainable, inasmuch as it was evidently not his intention to convert it to his own use, and make it permanently his own property, but merely to make use of it for the purpose of aiding him in escaping. ADU SHIKDAR *v.* QUEEN-EMPRESS **[I. L. R., 11 Calc., 635**

18. ——— *Property removed with criminal intent but with consent of owner.*—*A.* sought the aid of *B.* with the intention of committing a theft of the property of *B.'s* master. *B.* with the knowledge and consent of his master, and for the purpose of procuring *A.'s* punishment, aided *A.* in carrying out his object. On the prosecution of *A.* for theft,—*Held* that as the property removed was so taken with the knowledge of the owner, the offence of theft had not been committed. EMPRESS *v.* TROYLUKHONATH CHOWDHRY **[I. L. R., 4 Calc., 366 : 3 C. L. R., 525**

19. ——— *Possession of wood by forest inspector.—Removal of wood without payment of fees.*—Possession of wood by a forest inspector, who is a servant of Government, is possession of the Government itself; and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, constitutes theft within the meaning of section 378 of the Penal Code, if that consent was unauthorised or fraudulent. REG. *v.* HANMANTA . **I. L. R., 1 Bom., 610**

THEFT.—Penal Code, s. 378—*continued.*

20. ——— **and s. 95.**—*Valueless produce.—Property almost valueless.*—Conviction and sentence by a Magistrate reversed, as the act of which the accused was convicted—taking pods (almost valueless) from a tree standing upon Government waste ground—came within the meaning of section 95 of the Penal Code, and did not therefore amount to theft. REG. *v.* KASYA BIN RAVJI. **[5 Bom., Cr., 35**

21. ——— *Retaining possession of nets of poachers.*—The prisoner, acting *bonâ fide* in the interests of his employers, and finding a party of fishermen poaching on his master's fisheries, took charge of the nets, and retained possession of them, pending the orders of his employers. *Held* that the prisoner was not guilty of theft. QUEEN *v.* NOBIN CHUNDER HOMDAR . . **6 W. R., Cr., 79**

22. ——— *Taking fish in navigable river.*—The taking fish in that portion of a navigable river over which a right of julkur exists in another person does not fall within section 378 of the Penal Code. HURI MOTI MODDOCK *v.* DENONATH MALO . . . **19 W. R., Cr., 47**

BHUSUN PARUI *v.* DENONATH BANERJEE **[20 W. R., Cr., 15**

23. ——— *Taking fish from creek.*—The wrongful taking of fish from a creek is not theft. QUEEN *v.* REVU POTHADU **[I. L. R., 5 Mad., 390**

24. ——— **s. 379.**—*Possession.—Fish in an enclosed tank.*—Where the accused were found fishing without permission in an enclosed tank belonging to the municipality of the town of Sirsi, it was held that they could be convicted of theft, as the tank from which the fish were taken was apparently an enclosed tank, and the fish were, therefore, restrained of their natural liberty, and liable to be taken at any time according to the pleasure of the owner, and were, therefore, subjects of theft. *Bhusun Parui* v. *Denonath Banerjee, 20 W. R., Cr., 15*; and *Queen* v. *Revu Pothadu, I. L. R., 5 Mad., 390*, distinguished. QUEEN-EMPRESS *v.* ADAM VALAD SHAIK FARID . **I. L. R., 10 Bom., 193**

25. ——— *Illegal seizure and impounding of cattle.*—The illegal seizure and impounding of cattle is not theft within the meaning of the Penal Code, even if effected with the malicious intent of subjecting the owners to additional expense, inconvenience, and annoyance. ARADHUN MUNDUL *v.* MYAN KHAN TAKADGEER . **[24 W. R., Cr., 7**

26. ——— *Removal of salt naturally formed.—Bom. Salt Acts, XXVII of 1837 and XXXI of 1850.*—Dishonest removal of salt naturally formed in a creek which was under the supervision of an officer belonging to the Customs Department constitutes theft, the salt having been legally appropriated by such officer. *Per* BAYLEY and WEST, *JJ.*—But removal for one's own use from a creek of such salt not legally appropriated constitutes no offence under the Penal Code or the Salt Acts, though the salt becomes liable to detention. REG. *v.* MANSANG BHAVSANG . . . . . **10 Bom., 74**

27. ——— *Taking salt from swamp surrounded by police.—Possession.*—A swamp, the property of Government, having been surrounded with police guards by Government to prevent salt being removed,—*Held* that the taking against the will of Government, and with the intention of obtaining an unlawful gain, of salt which had been spontaneously produced on the swamp, was theft. QUEEN *v.* TAMMA GHANTAYA **[I. L. R., 4 Mad., 228**

28. ——— **and s. 204.**—*Secreting document produced before arbitrator.—Intention.—Remoteness of object.*—Where the plaintiff in a suit referred to arbitration by consent, with a view to prevent a witness from referring to an endorsement on a bond (which tended to show that defendant had paid more than it was alleged had been paid by him) snatched up the bond which was lying beside the arbitrator, ran away, and refused to produce it,—*Held* that the offence committed was not theft, but secreting a document under section 204 of the Penal Code. SUBRAMANIA GHANAPATI *v.* QUEEN **[I. L. R., 3 Mad., 261**

29. ——— **s. 380.**—*Theft in a building.—Requisites for offence.*—All that is necessary in order to constitute the offence of theft in a building, is that the property should be under the protection of the building: it is not necessary to show unlawful entrance into the building. QUEEN *v.* ISHREE PERSHAD . . **24 W. R., Cr., 49**

30. ——— **and s. 409.**—*Constables taking property from house under their charge.*—Theft by constables of property from the house they were employed to guard is punishable under section 380, and not section 409, Penal Code. QUEEN *v.* BOIDNATH SINGH . . . **3 W. R., Cr., 29**

31. ——— **s. 381.**—*Theft by servant.—Hired boatman.*—A hired boatman does not come within the definition of a clerk or servant under section 381 of the Penal Code. Theft by such a person on board a boat comes under section 380. QUEEN *v.* BAWOOL MANJEE **[8 W. R., Cr., 32**

32. ——— **ss. 381, 409.**—*Stealing money in accused's charge.—Criminal breach of trust.*—The prisoners were charged with having stolen a sum of money shut up in a box and placed in the police treasury buildings, over which they, as burkundauzes, were placed on guard. *Held* that the charge should have been made under section 381 of the Penal Code (theft by servant in possession of property), and not under section 409 (criminal breach of trust by public servant). QUEEN *v.* JUGGUENATH SINGH . . . **2 W. R., Cr., 55**

THEKADAR.

1. ——— **Meaning of term.**—The term "thekadar" is properly applicable to hereditary culti-

THEKADAR.—Meaning of term—*continued.*

vators only when they have also a theka or lease of a share in, or the whole of, the profits of an estate. BAIJ NATH *v.* MUNGLEE . . **2 N. W., 411**

2. ——————— *Mode of creation of thekadar's interest.—Effect of accepting theka.*—A thekadar is ordinarily a person who holds a theka or lease of the whole of a zemindar's interest in a village. There is nothing in the law which renders a writing necessary to the creation of such an interest. It is not to be inferred from the mere circumstance that persons accepted a theka that they forewent their existing right. LEELA DHUR *v.* BHUGWUNT . . . . . **3 N. W., 39**

TICKET, REFUSAL TO PRODUCE—

See RAILWAY ACT, 1871, s. 2.
[I. L. R., 1 Bom., 25

See RAILWAY ACT, 1879, ss. 17, 31.
[I. L. R., 1 Calc., 192

TIMBER, RIGHT TO—

See CUSTOM—EVIDENCE OF CUSTOM.
[9 W. R., 97

TIME FOR APPEARANCE OF DEFENDANT, EXTENSION OF—

See NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON—
[1 Ind. Jur., N. S., 395
3 B. L. R., O. C., 83

See PRACTICE—CIVIL CASES—LEAVE TO SUE OR DEFEND.
[I. L. R., 3 Calc., 539

TIME BARGAIN.

See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS . **I. L. R., 9 Calc., 791**

TITLE.

	Col.
1. EVIDENCE AND PROOF OF TITLE	6000
(*a*) GENERALLY	6000
(*b*) LONG POSSESSION	6005
2. MISCELLANEOUS CASES	6007

See CHUR LANDS . **2 B. L. R., P. C., 4**
[17 W. R., 73

See CASES UNDER CLAIMS TO ATTACHED PROPERTY.

See CASES UNDER ONUS PROBANDI—POSSESSION AND PROOF OF TITLE.

See PARTITION—JURISDICTION OF CIVIL COURT IN SUITS RESPECTING PARTITION . **8 B. L. R., Ap., 73, note**

See CASES UNDER POSSESSION—EVIDENCE OF TITLE.

See CASES UNDER POSSESSION—SUITS FOR POSSESSION—PROOF OF PARTICULAR TITLE.

TITLE—*continued.*

See CASES UNDER RESISTANCE OR OBSTRUCTION TO EXECUTION OF DECREE.

——— Acknowledgment of—

See CASES UNDER LIMITATION ACT, 1877, s. 19 (1871, ART. 148)—ACKNOWLEDGMENT OF OTHER RIGHTS.

——— Breach of covenant for—

See DAMAGES—SUITS FOR DAMAGES—BREACH OF CONTRACT.
[I. L. R., 2 Bom., 273

——— Decision of Revenue Court as to—.

See CASES UNDER RES JUDICATA—COMPETENT COURT—REVENUE COURTS.

——— Declaration of, Suit for—

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE.

See CASES UNDER ONUS PROBANDI—DECLARATION OF TITLE.

See POSSESSION—SUITS FOR POSSESSION—PROOF OF PARTICULAR TITLE.
[I. L. R., 3 Calc., 224
I. L. R., 4 Calc., 699

——— Denial of—

See CASES UNDER ESTOPPEL—LANDLORD AND TENANT, DENIAL OF TITLE.

See CASES UNDER LANDLORD AND TENANT—FORFEITURE—DENIAL OF TITLE.

——— Disclaimer of—

See ADMISSION—ADMISSION IN STATEMENTS AND PLEADINGS.
[15 B. L. R., 10

——— Extinction of—

See CASES UNDER LIMITATION ACT, 1877, s. 28.

See RELINQUISHMENT OF TENURE.
[I. L. R., 1 Bom., 91, 208

——— Investigation of—

See CIVIL PROCEDURE CODE, 1882, s. 236 (1859, s. 214) . **3 B. L. R., A. C., 413**

——— Notice of—

See CASES UNDER VENDOR AND PURCHASER—NOTICE.

——— Obstruction to—

See DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS.
[I. L. R., 1 All., 688

——— Proof of—

See ESTOPPEL—ESTOPPEL BY DEEDS AND OTHER DOCUMENTS.
[I. L. R., 4 Calc., 397

TITLE.—Proof of—*continued.*

See LANDLORD AND TENANT—MIRASDARS. [I. L. R., 3 Bom., 340

See CASES UNDER POSSESSION—EVIDENCE OF POSSESSION.

See CASES UNDER POSSESSION—EVIDENCE OF TITLE.

See SANAD . I. L. R., 3 Bom., 340 [12 B. L. R., 120

——— Question of—

See APPEAL—NORTH-WEST PROVINCES ACTS . . I. L. R., 1 All., 366

See CASES UNDER BENGAL RENT ACT, 1869, s. 102.

See CERTIFICATE OF ADMINISTRATION—PROCEDURE . I. L. R., 3 Calc., 616 [I. L. R., 6 Calc., 303

See INSOLVENT ACT, s. 26. [I. L. R., 3 Calc., 434

See JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION. [2 N. W., 202

See JURISDICTION OF REVENUE COURT—BOMBAY REGULATIONS AND ACTS. [I. L. R., 1 Bom., 624

See PROBATE—OPPOSITION TO AND REVOCATION OF GRANT. [I. L. R., 4 Calc., 1

See RES JUDICATA—COMPETENT COURT—GENERAL CASES. [I. L. R., 5 Calc., 832

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See CASES UNDER RES JUDICATA—COMPETENT COURT—SMALL CAUSE COURT CASES.

See CASES UNDER SMALL CAUSE COURT, MOFUSSIL — JURISDICTION — TITLE, QUESTIONS OF—

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See SPECIAL APPEAL—SMALL CAUSE COURT SUITS—TITLE, QUESTION OF— [I. L. R., 2 Calc., 470

——— Slander of—

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——— Warranty of—

See SALE IN EXECUTION OF DECREE—PURCHASERS, TITLE OF GENERALLY. [4 Bom., A. C., 114 6 Bom., A. C., 258 12 W. R., 41 I. L. R., 2 All., 108, 828

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See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—RIGHTS OF PURCHASERS—RECOVERY OF PURCHASE-MONEY . I. L. R., 2 Bom., 258

See CASES UNDER VENDOR AND PURCHASER.

——— by long possession.

See ACCRETION—RE-FORMATION AFTER DILUVIATION . I. L. R., 3 Calc., 796

See BOMBAY REGULATION V OF 1827, s. 1. [I. L. R., 1 Bom., 352

See CASES UNDER POSSESSION—EVIDENCE OF TITLE.

——— on sale of goods.

See CONTRACT—BREACH OF CONTRACT. [8 B. L. R., 581

——— to land between high and low water marks.

See SPECIFIC PERFORMANCE—SPECIFIC PERFORMANCE ALLOWED. [9 B. L. R., 128

1. EVIDENCE AND PROOF OF TITLE.

(a) GENERALLY.

1. ——— **Evidence of title.**—*Oral evidence.*—Where the Principal Sudder Ameen, reversing the decision of the Munsif, dismissed a claim to the possession of certain land, on the ground that "mere oral evidence unsupported by any documentary evidence was not admissible to establish a man's title to landed property," the High Court on appeal reversed his decision and held that oral evidence, if believed, may be as good for proving a man's title as documentary evidence. DURBAN FAKEER *v.* NOBIN-CHANDRA MAZUMDAR [1 B. L. R., S. N., 16 : 10 W. R., 217

2. ——— *Documentary evidence in India.*—The presumption in favour of the genuineness of documents offered in evidence in India is very weak, but it must not be held that the presumption is in favour of forgery, and when a long series of documents is produced showing a reasonable origin of title nearly a century ago, a regular deduction of that title and a possession consistent with it, confirmed by the fact of such possession existing at the time of the commencement of the respondents' title by purchase in 1833, the evidence of extrinsic improbability should be very strong indeed to counterbalance the weight of such testimony. WISE *v.* BHOOBUN MOYEE DEBIA [3 W. R., P. C., 5 : 10 Moore's I. A., 165

3. ——— *Pottah granted by Collector.*—A pottah of land in Calcutta granted by the Collector is not a muniment of title, but only evidence of a holding according to a local and fiscal regulation. FREEMAN *v.* FAIRLIE [1 Moore's I. A., 305

4. ——— *Forged documents.*—If a party put in evidence in support of his title,

TITLE—*continued.*

1. EVIDENCE AND PROOF OF TITLE —*continued.*

(*a*) GENERALLY—*continued.*

Evidence of title—*continued.*

documents proved to be forged, but the other evidence adduced by him is not impeached, the Court, in rejecting the forged documents, will take the unimpeached evidence into consideration, and, if satisfied, adjudicate thereon. SEVVAJI VIJAYA RAGHUNADHA VALOJI KRISTNAN GOPALAR *v.* CHINNA NAYANA CHETTI . . . **10 Moore's I. A., 151**

5. ——— *Suit for possession.*—In a suit to recover possession of land which both the plaintiff and defendant claimed to have reclaimed from jungle and to have possessed many years, and for which each claimed to have obtained a pottah from Government, the mere fact that the land was included in plaintiff's pottah was held to be insufficient, without going into the facts to ascertain possession, to entitle him to a decree. GOLAM REZA CHOWDHRY *v.* CHANDOO MEAH LUSHKUR **[15 W. R., 45**

6. ——— *Possession.—Presumption.*—The ordinary presumption that possession goes with the title would be of no avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession on one side opposed by evidence apparently strong also on the other side, the Privy Council held that in estimating the weight due to the evidence on both sides, the presumption might, under the circumstances of the case, be regarded, and that with the aid of it there is stronger probability that the case of the side that had possession was true than that of the party out of possession. RUNJEET RAM PANDAY *v.* GOBERDHUN RAM PANDAY . . . . **20 W. R., P. C., 25**

7. ——— *Possession.—Limitation Act (XV of 1877), arts. 143, 144.—Conflicting evidence of possession.—Presumption of title.*—Where two adverse parties are each trying to make out a possession of twelve years, and the evidence is conflicting and not conclusive on either side,—*Held* that the presumption that possession goes with the title must prevail. DHARM SINGH *v.* HUR PERSHAD SINGH . . . **I. L. R., 12 Calc., 38**

8. ——— *Possession, Presumption of.—Waste lands.*—In disputes as to the right to the possession of jungle lands, it is only in cases where neither party has exercised any acts of ownership over the lands in question that the Court may resort to evidence of title, and presume that the party proved to have the title has also possession. RAM BANDHU *v.* KUSU BHATTU **[5 C. L. R., 481**

9. ——— *Suit for possession.—Possession of title-deeds and receipts for rent.*—In a case involving the alternative question of fact whether certain land belonged to *R.* or *C.*, neither the one nor the other of the opposite party venturing to state who his opponent was, and the testimony of the witnesses on this point being doubtful,—*Held* that *R.*, who was in possession of the title-deeds and

TITLE—*continued.*

1. EVIDENCE AND PROOF OF TITLE —*continued.*

(*a*) GENERALLY—*continued.*

Evidence of title—*continued.*

of the receipts of rent, ought to succeed, unless there was something on the record to countervail such strong evidence. KHODA BUKSH KHAN *v.* CHOA **[19 W. R., 162**

10. ——— *Suit for declaration of title.—Onus probandi.—Production of title-deeds.*—The plaintiff sued for declaration of her title to property of which the defendant was in possession, but of which she produced the title-deeds in favour of herself. *Held*, the onus was on the defendant to disprove the plaintiff's title, and the defendant was not allowed to raise certain fresh issues; but the plaintiff was, under the circumstances of the case, entitled to rely on the title given her by the production of the title-deeds in her favour. SWARNAMAYI RAUR *v.* SRINIBASH KOYAL . **6 B. L. R., 144**

11. ——— *Possession.—Uninterrupted and undisputed possession.*—Uninterrupted and undisputed possession for a long time constitutes sufficient *primâ facie* evidence of title; but if this possession is admitted to be under an adoption, it will avail nothing if the adoption fails. HAIMUN CHULL SINGH *v.* GUNSHEAM SINGH **[5 W. R., P. C., 69**

12. ——— *Suit for possession.*—Where, in a suit to recover possession of land, the plaintiff succeeded in proving that he had been in possession up to a recent date, and that he had been forcibly dispossessed by the defendant, the lower Appellate Court threw upon the defendant the burden of proving his title, and, on his failing to do so, decreed the case. *Held* that this was a fair inference of title and of a right to be replaced in possession without going further into the title,—that is, to the mode of its acquisition. TRILOCHUN GHOSE *v.* KAILAS NATH SIDHANTO BHOWMIK BHUTTACHARJI . **3 B. L. R., A. C., 298: 12 W. R., 175**

13. ——— *Proof of title.—Suit for possession.*—In a suit to recover possession, on the allegation that plaintiff had been illegally ousted, though holding under a lease from defendant, the latter urged that, though plaintiff had been allowed to hold the tenure as a tehsildar or collector of rents, he had never been the ijaradar or farmer in possession. The Judge found that the estate was really let out in ijara to the plaintiffs by the defendant, who had recovered rents and granted him receipts on account of the ijara mehal. *Held* that this was a complete finding in favour of the plaintiff's title, and that it was not necessary for him to sue for the pottah which had been wrongfully denied him by defendant. JOHEEROODDEEN MAHOMED *v.* DABEE PERSHAD SINGH . . . . **13 W. R., 21**

14. ——— *Proof of title.—Evidence of possession.*—In a suit to establish title, evidence of plaintiff's possession prior to the summary award under section 15, Act XIV of 1859,

TITLE—*continued.*

1. EVIDENCE AND PROOF OF TITLE —*continued.*

(*a*) GENERALLY—*continued.*

Evidence of title—*continued.*

under which he was dispossessed, may be good evidence of his title, and must be considered. BULLUBEE KANT BHUTTACHARJEE *v.* DOORJO DHUN SHIKDAR [7 W. R., 89

15. ——— *Possession.—Evidence Act, s. 110.—Specific Relief Act, 1877, s. 9.*—In a suit for possession, where the plaintiff proved that he had been in possession of the lands in dispute, and that he had been ousted by the defendants, who were unable to give any proof of their right so to oust him, or of a superior title,—*Held* (PRINSEP, *J., dissentiente*) that the prior possession of the plaintiff was *primâ facie* evidence of title, and that he was entitled to a decree. *Per* PRINSEP, *J.*—Proof of prior possession and of illegal dispossession are in themselves no evidence of title, except in a possessory suit under the Specific Relief Act (I of 1877). Section 110 of the Evidence Act applies only to actual and present possession, and does not declare generally that possession shall always be *primâ facie* evidence of title. KAWA MANJI *v.* KHOWAZ NUSSIO [5 C. L. R., 278

16. ——— *Possession.—Lands attached by Government as being disputed lands.*—Disputes respecting the boundaries of the zemindaris of Yettiapooram and Ramnad in the district of Madura having led to acts of violence by the ryots, the Government, in the year 1836, to preserve the public peace attached the disputed lands and took possession for the benefit of the party to whom the lands should be judicially awarded. At and before the time of the Government taking such possession, the zemindar of Yettiapooram was in possession of certain lands adjacent to, and taken as a part of, the lands in dispute. The lands remained under attachment by Government for a period of nearly twenty years, no steps having been taken regarding them till the year 1855, when the zemindar of Yettiapooram brought a suit against the Collector of Madura and the zemindar of Ramnad to recover possession of the land so formerly occupied by him, and for the mesne profits thereof while in the possession of the Government. Although no clear title in this suit was proved by either zemindar, it was held by the Courts in India, and affirmed on appeal by the Judicial Committee, that the fact of possession of the lands by the zemindar of Yettiapooram before and at the time of the attachment by Government was, under the circumstances, evidence of title, and the Government was ordered to restore the lands to him. ZEMINDAR OF RAMNAD *v.* ZEMINDAR OF YETTIAPOORAM . . 10 Moore's I. A., 47

17. ——— *Proof of possession.—Suit for possession.*—In a suit to recover possession of two plots as parcels of the plaintiff's ancestral jammai lands, the Court of first instance found that one plot was parcel, but was not satisfied that the other was so also. The lower

TITLE—*continued.*

1. EVIDENCE AND PROOF OF TITLE —*continued.*

(*a*) GENERALLY—*continued.*

Evidence of title—*continued.*

Appellate Court agreed with the first finding, but further found that there was sufficient evidence of possession to show that both plots were parcels of the jammai. *Held*, reversing the decision of FIELD, *J.*, that on second appeal the High Court was not entitled to question the sufficiency of that evidence; and, further, that one plot having been found to be parcel of the jammai, it was sufficient to give evidence of possession and ownership to prove that the other plot was also parcel. *Dadabhai Narsidas v. Sub-Collector of Broach, 7 Bom., A. C., 82*, distinguished. BARODA KANTO BEEPARI *v.* JODHISTEER NATH . . . . 10 C. L. R., 99

18. ——— *Registration after proclamation.—Evidence of assertion of title.*—The act of registration after a proclamation under section 20, Regulation XXXVII of 1793, amounts to a public, open, and notorious assertion of title on the one side, and the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, affords an equally strong presumption of the non-existence of any title on the other. USUDOOLLAH *v.* IMAMAN [5 W. R., P. C., 26: 1 Moore's I. A., 19

19. ——— *Proof of title.—Registration in Collector's books.*—Registration in the Collector's books is not of itself a proof of title. GOBIND NATH SEIN *v.* GOBIND CHUNDER SEIN [10 W. R., 393

AMEEROONISSA BIBEE *v.* WOOMAROODDEEN MAHOMED CHOWDHRY . . 14 W. R., 49

20. ——— *Entry in Collector's books.—Proof of title.*—The Collector's book is kept for purposes of revenue, not for purposes of title, and the fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title, or defeat the title of any other person. FATMA KOM NUBI SAHEB *v.* DARYA SAHEB [10 Bom., 187

COLLECTOR OF POONA *v.* BHAVANRAV BALKRISHNA . . . . 10 Bom., 192

SANGAPA MALAPA *v.* BHIMANGOWDA MARIAPA [10 Bom., 194

21. ——— *Co-proprietors.—Registration of shares in land.*—Registration of land under Bengal Act VII of 1876 is not only no conclusive proof, but no evidence at all, upon the question of title of a proprietor so registered. Such registration does not relieve a plaintiff from the onus of proving his title to land claimed by him. RAM BHUSAN MAHTO *v.* JEBLI MAHTO [I. L. R., 8 Calc., 853.

See also SARASWATI DASI *v.* DHANPUT SINGH [I. L. R., 9 Calc., 461: 12 C. L. R., 12

TITLE—*continued.*

1. EVIDENCE AND PROOF OF TITLE —*continued.*

(*a*) GENERALLY—*continued.*

Evidence of title—*continued.*

22. ——— *Mirasi title.—Payment of rent.—Presumption.*—Continuous payment of rent for about a hundred years held to give rise to a presumption that the tenant held under a mirasi title. BRAJANATH KUNDU CHOWDHRY *v.* LAKHI NARAYAN ADDI . . 7 B. L. R., 211

23. ——— *Title confirmed by decree.*—Where a proprietary title is affirmed by a decree, the property is not subsequently held under the decree alone, but under the original title. AMRIT KOOER *v.* ROOP KOOER
[2 N. W., 459 : Agra, F. B., Ed. 1874, 240

(*b*) LONG POSSESSION.

24. ——— *Title by long possession.—Adverse possession.—Limitation.*—Twelve years' continuous possession of land by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner, but confers a good title upon the wrong-doer. *Semble,*—Such title may be transferred to a third person whilst it is in course of acquisition, and before it has been perfected by possession. GOSSAIN DASS CHUNDER *v.* ISSUR CHUNDER NATH . . I. L. R., 3 Calc., 224

See GOLUCK CHUNDER MASANTA . *v.* NUNDO COOMAR ROY
[I. L. R., 4 Calc., 699 : 3 C. L. R., 450

25. ——— *Title by long possession.—Adverse possession.—Limitation.—Grant made by wife during absence of husband.*—A wife, during the prolonged absence of her husband, who was erroneously supposed to be dead, acting in excess of the limited powers of a wife in possession of her absent husband's property, made a mirasi grant of a portion of her husband's estate. The grantee entered into and remained in possession for upwards of twelve years. *Held* that the position of the grantee was not that of a lessee, and that his possession (although in its inception an act of trespass against the husband) having continued for upwards of twelve years, had perfected his title to the lands. One who holds possession on behalf of another does not, by mere denial of that other's title, make his possession adverse, so as to give himself the benefit of the statute of limitation. BEJOY CHUNDER BANERJEE *v.* KALLY PROSONNO MOOKERJEE . . . . I. L. R., 4 Calc., 327

26. ——— *Declaration of title.—Adverse possession.—Variation between pleading and proof.*—A declaration of title may be made upon proof of twelve years' adverse possession. Such declaration cannot, however, be given on a title not distinctly stated in the plaint or in the issues. SHIBO KUMARI DEBI *v.* GOVIND SHAW TANTI . . . . I. L. R., 2 Calc., 418

TITLE—*continued.*

1. EVIDENCE AND PROOF OF TITLE —*continued.*

(*b*) LONG POSSESSION—*continued.*

Evidence of title—*continued.*

27. ——— *Suit for declaration of title.—Failure to prove stated title.—Title by long possession.*—In a suit for a declaration of title to a share of landed estate, although the plaintiffs fail to satisfy the Court that their title to the land has been acquired in the way they state, yet if it is admitted that they have been in possession for more than twelve years, the effect of such possession is to extinguish other titles, if these existed, and the plaintiffs ought to have the declaration sought. RAM LOCHUN CHUCKERBUTTY *v.* RAM SOONDER CHUCKERBUTTY . . . 20 W. R., 104

JUGGUT CHUNDER *v.* BANEE MADHUB BANERJEE
[23 W. R., 205

28. ——— *Proof of title.—Possession for period of limitation.*—Plaintiff stating that he was obstructed in the cultivation of certain land which belonged to him, asked that the obstruction be removed and damages granted. The damages were disallowed, but the Civil Judge made a declaration of title in the plaintiff's favour, basing that entitlement on the statute of limitations. *Held* that where a man seeks a declaration of a title other than the possession which he has, mere possession for the period of the statute will not justify the declaration, which, allowing it to be made, ought to be based upon a finding of the title alleged by plaintiff, and not upon the existence of a possession for the period required by the statute to bar the action of another. Accordingly, the lower Appellate Court was required to return a finding on the issue "whether the title asserted by plaintiff is proved." TIRUMALASAMI REDDI *v.* RAMA SAMI REDDI
[6 Mad., 420

29. ——— **Proof of title.**—*Suit for declaration of title.—Adverse possession.—Case made in plaint.*—Where a specific title has been alleged, but not proved, and the plaintiff endeavours to succeed in the first Court or second Court of Appeal upon a title by twelve years' adverse possession, he must be prepared to show that this other title by twelve years' adverse possession was raised in the Court of first instance with sufficient clearness to enable his adversary to understand that he claimed to succeed as well by twelve years' adverse possession as by the specific title alleged. KRISHNA CHURN BAISAOK *v.* PROTAB CHUNDER SURMA . I. L. R., 7 Calc., 560

30. ——— *Adverse possession.—Unregistered deed of sale.*—On the 18th January 1876 plaintiff became purchaser at a Court's sale of the right, title, and interest of *G.* and *N.* in a shop, and, having been obstructed by defendant in obtaining possession of it, sued to recover it from him. The plaint was filed on the 27th January 1877. Defendant answered that he purchased it from *G.* under a deed of sale dated 5th January 1865, and that he had been in possession since that day. The deed of sale was not admitted in evidence

TITLE—*continued.*

1. EVIDENCE AND PROOF OF TITLE —*continued.*

(*b*) LONG POSSESSION—*continued.*

Proof of title—*continued.*

for want of registration, but it was found that defendant had been in possession as owner since 5th January 1865. *Held* that, although the defendant could not prove a title by purchase, it was open to him to establish his title without the aid of the deed of sale; that his possession of the premises for more than twelve years prior to the institution of the suit was adverse both to *G.* and *N.*, and that the claim of the plaintiff, who was assignee of their interest, was consequently barred. *Balaram Nemchand* v. *Appa, 9 Bom., 121,* explained; *Somu Gurrukal* v. *Rangammal, 7 Mad., 13,* referred to and followed. SAMBHUBHAI KARSANDASS *v.* SHIVLALDASS SADASHIVDASS . . . I. L. R., 4 Bom., 89

31. ——— *Long possession.—Liability to assessment of revenue.*—A title to hold land free from assessment to revenue cannot be acquired by any length of possession revenue-free. SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* RAM UGRAH SINGH . . I. L. R., 7 All., 140

2. MISCELLANEOUS CASES.

32. ——— **Right to raise question of title.**—*Boundary dispute.—Suit for possession.*—In a boundary dispute the title of the plaintiff is not, except under very peculiar circumstances, open to attack; but when the plaintiff sues for possession of property in the defendant's hands, not as forming part of another estate, but claiming a right thereto under a superior title, then the defendant has a right to call the plaintiff's title in question. RAMCHUNDRE BANERJEE *v.* MUDDUNMOHUN TEWAREE [W. R., 1864, 355

33. ——— *Suit for possession of land held under superior holders.*—The plaintiff sued to recover possession of certain lands said to have been included in a talooka pottah given him by the zemindars, alleging that the defendants were obstructing his possession. For the defence it was averred that these lands fell within a 9 annas share which belonged to one *D.*, and that by process of sale they became the right of other parties under whom defendants held as lessees. *Held* that, notwithstanding the parties to this suit held under a superior landholder, plaintiff was entitled to have his title put in issue and determined. NAGUR CHAND *v.* DOORGA DOSS CHOWDHRY [11 W. R., 137

See DINOMONEE BANERJEE *v.* GYBUTOOLLAH KHAN [2 W. R., 138

34. ——— **Onus probandi.**—*Proof of title.—Suit for confirmation of title and declaratory decree.*—When a plaintiff sues for confirmation of possession and seeks a declaratory decree, he must make out his title affirmatively. If the Indian Courts agree in holding that he has not done so, even though the High Court may not have attended to the depositions of material witnesses, the Judicial Committee will not disturb the decision of the High Court. TORAB ALLY *v.* MAHOMED TUKKEE [19 W. R., P. C., 1

TITLE—*continued.*

2. MISCELLANEOUS CASES—*continued.*

Onus probandi—*continued.*

35. ——— *Claim under particular title.—Presumption.*—Where a plaintiff claims, not under any general right of inheritance, but expressly under a deed, he must prove that deed: no legal presumption as to the contents of the deed can arise from a consideration of what the party, through whom he claims, would have been entitled to by the law of inheritance, had there been such a deed. MOOAD MULLICK *v.* BELAT MULLICK [9 W. R., 385

36. ——— *Possession.—Proof of title and possession.—Suit for injunction.—Hindu law.—K. C.*, a Hindu, died in March 1864, possessed, among certain other property, of a house, and leaving three sons, *R.*, *B.*, and *T.* He also left a will, of he which appointed *R.* executor, and declared that "the whole of my estate, both real and personal, and the existing shop, you, *R.*, are the proprietor of the whole." *R.* was directed to furnish the expenses of the household and carry on the shop, and pay for religious observances, &c. The testator then left legacies to his daughters and others, but made no mention of his sons *B.* and *T.* *R.* applied for probate of the will and a caveat was entered by *B.*, but the opposition was withdrawn on a compromise, and the will was proved; the compromise, however, was never carried out. In August 1866 *R.* died, leaving a son, *M.*, and his two brothers, *B.* and *T.*, surviving him, and having made a will appointing *T.* executor, and giving him the power of dealing with all the property. *T.* applied for probate, but was opposed by *M.*; but on 23rd May 1867 probate was granted. On 26th March 1867 *B.* and *T.* mortgaged a two-third share in the house to the defendant, and on default in payment of the mortgage-debt, the defendant obtained a decree for payment or sale on 6th January 1868. On 17th August 1867 *T.* mortgaged the whole house to the plaintiffs to secure payment of money borrowed to carry out *A.'s* will. The plaintiffs obtained a decree for foreclosure on 15th July 1869, and subsequently a decree for possession. In a suit brought by the plaintiffs in possession, alleging that the defendant's mortgage and decree threw a cloud on their title, and that they would be injured by the sale, the plaint prayed that the defendant might be restrained by injunction from proceeding to sale, and his mortgage be brought into Court and cancelled. *Held* that, to entitle them to relief, they must prove their title as well as their possession, and on failure to do so the suit must be dismissed. ROOPLALL KHETTRY *v.* MOHENDRO NATH ROY [10 B. L. R., 271, note

37. ——— **False deed set up in support of rightful claim.**—A party is not precluded from succeeding upon a title established by a genuine

TITLE—*continued.*

2. MISCELLANEOUS CASES—*continued.*

False deed set up in support of rightful claim—*continued.*

deed, because he sets up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title. PATTABHIRAMIER *v.* VENCATAROW NAICKEN
[7 B. L. R., P. C., 136 : 15 W. R., 35
13 Moore's I. A., 560

38. ———— Transfer of property.—*Relinquishment of dur-mokurrari lease.—Necessity for conveyance.*—Where a dur-mokurrari has been granted and then relinquished for valuable consideration to the grantors, no formal reconveyance is necessary to revest the title in the latter. IMAMBANDI BEGUM *v.* KUMLESWARI PERSHAD
[L. R., 13 I. A., 160 : I. L. R., 14 Calc., 109

TITLE OF SUIT, IRREGULARITY IN—

See HIGH COURT, JURISDICTION OF—HIGH COURT, CALCUTTA—CIVIL.
[2 Ind. Jur., N. S., 245

TITLE-DEEDS.

See CASES UNDER DEPOSIT OF TITLE-DEEDS.

———— Delivery of, for specific purpose.

See ATTORNEY AND CLIENT.
[15 B. L. R., Ap., 15

———— Possession of—

See EVIDENCE—CIVIL CASES—MODE OF DEALING WITH EVIDENCE.
[2 W. R., P. C., 167
8 Moore's I. A., 4

———— Production of—

See INSPECTION OF DOCUMENTS.
[5 Bom., O. C., 152
I. L. R., 1 Bom., 496
I. L. R., 11 Calc., 655
I. L. R., 10 Calc., 808

See ONUS PROBANDI—DECLARATION OF TITLE . . . 6 B. L. R., 144

See TITLE—EVIDENCE AND PROOF OF TITLE—GENERALLY . 6 B. L. R., 144
[19 W. R., 162

———— Suit to recover—

See JURISDICTION—SUITS FOR LAND—GENERAL CASES.
[I. L. R., 4 Calc., 322

TITLES OF HONOUR.

See PLAINT—FORM AND CONTENTS OF PLAINT—DEFENDANTS.
[12 B. L. R., 443; 445, note

TODA GARAS HAQ.

See DUTIES.
[2 Bom., 253 : 2nd Ed., 239
7 Bom., A. C., 50

See LIMITATION ACT, 1877, ART. 144—INTEREST IN IMMOVEABLE PROPERTY.
[13 B. L. R., 254

See PENSIONS ACT, 1871, SS. 3 AND 4.
[I. L. R., 1 Bom., 203
I. L. R., 4 Bom., 443
I. L. R., 5 Bom., 408

See PENSIONS ACT, 1871, S. 11.
[I. L. R., 4 Bom., 432

TODDY.

See BOMBAY ABKARI ACT, 1878, S. 14 AND S. 24 . . I. L. R., 6 Bom., 398
[I. L. R., 9 Bom., 462

See BOMBAY REVENUE JURISDICTION ACT, 1876 . I. L. R., 9 Bom., 462

See JURISDICTION OF CIVIL COURT—REVENUE . . I. L. R., 9 Bom., 462

TOLLS.

1. ———— Lessee of tolls.—*Act VIII of 1851.*—A lessee of tolls was held not to be a person employed in the management and collection of tolls within the meaning of Act VIII of 1851. IN THE MATTER OF BANKA BIHARI GHOSE'
[2 B. L. R., A. Cr., 17 : 11 W. R., 26

2. ———— Illegal collection of tolls.—*Act VIII of 1851, s. 6.—Public road.*—To justify a conviction under section 6, Act VIII of 1851, for illegal collection of a toll on a public road, it was necessary that the road should be a public road within the meaning of section 2 of the Act. IN RE NARENDRONARAIN SINGH. . . 6 W. R., Cr., 48

3. ———— Illegal demand of toll.—*Act VIII of 1851, s. 6.—Summary offence.*—A charge of an illegal demand of toll under Act VIII of 1851, section 6, ought not to be dealt with summarily under Chapter XVIII of the Criminal Procedure Code, 1872. The power of levying tolls under Act VIII of 1851 is vested in the Lieutenant-Governor of Bengal, and is restricted to levying tolls only at the toll-bar: the establishment of a toll must be by some distinct resolution of the Government notified in some way or other by the Government. The word "extortionately" in section 6 of Act VIII of 1851 is not used in the same sense as it is used in the Penal Code, but as meaning an unlawful demand of toll accompanied by pressure, the pressure in this case being the exercise of the powers indicated in section 3 of the Act by seizing the complainant's horses and carts and detaining them until the toll was paid. UTTOM CHUNDER GANGOOLY *v.* ISSUR CHUNDER MOOKERJEE
[22 W. R., Cr., 76

TORTS.

See CASES UNDER DAMAGES—SUITS FOR DAMAGES—TORTS.

TORTS—*continued.*

See CASES UNDER DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS.

TORTURE.

See ABETMENT—TORTURE.
[7 W. R., Cr., 3
21 W. R., Cr., 11

See POLICE OFFICER . 7 W. R., Cr., 3

TOTAL LOSS.

See INSURANCE—MARINE INSURANCE.
[6 B. L. R., 218: 7 B. L. R., 347
3 Bom., A. C., 1
Bourke, O. C., 17, 228

TOWAGE, LIEN FOR—

See BOTTOMRY BOND . 6 B. L. R., 323

TOWAGE CONTRACT.

See ACTION IN REM.
[I. L. R., 10 Calc., 865

TOWING, RULES FOR—

See STEAM-TUGS . . 1 Hyde, 293
[2 W. R., P. C., 51: 8 Moore's I. A., 103

TOWN DUTIES, BOMBAY.

——— *Act XIX of 1844.—Suit to levy a tax on cotton and cotton seeds purchased in, and exported from, Broach.—Cess illegal.—Agency.—Trust.*—The plaintiff, manager and part proprietor of a Vallabhacharya temple at Broach, sued the defendant to establish the right of the temple to levy a cess on cotton and cotton seed purchased in Broach and exported from it. The defendant denied the plaintiff's right and contended (*inter alia*) that, even if the right existed until 1844, it was then abolished by Act XIX of that year, which "enacted that from the first day of October 1844 all town duties, kusubviras, mohtarphas, baluti taxes, and cesses of every kind on trades and professions, under whatsoever name, levied within the Presidency of Bombay, and not forming a part of the land revenue, shall be abolished." *Held* that Act XIX of 1844 applied to the cess claimed by the plaintiff. The expression "cesses of every kind" included the cess on cotton and cotton seeds, and absolutely put an end to the right, if any existed, of the Government or of any private individual of levying the same. *Held*, also, the suit could not be regarded as a suit for money had and received by the defendant to the plaintiff's use, or as one to recover money received by the defendant as trustee or agent. GOSVAMI SHRI PURUSHOTAMJI MAHARAJ *v.* ROBB
[I. L. R., 8 Bom., 398

TRADE, CONTRACT IN RESTRAINT OF—

See CASES UNDER CONTRACT ACT, S. 27.

TRADE MARK.

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS.
[I. L. R., 10 Bom., 617

See INJUNCTION—SPECIAL CASES—TRADE MARK . . . 3 B. L. R., Ap., 4
Cor., 150

1. ——— Injunction to restrain use of trade marks.—*Combination of figures.*—The plaintiffs, from 1872, imported and sold an article described as 7¼lb grey shirtings, and marked as follows: "In the centre of each piece of cloth a stamp in blue colour of a turtle in a star, with the words 'trade mark;' underneath, in a semi-circular form, is the name 'Fleming, Galbraith, & Co., Manchester,' and under this the number 39 within a star, and at the bottom of each piece the number 2008." In 1877 the plaintiffs discovered that the defendants were importing from the same manufacturers, and selling cloth of a similar quality marked as follows: "A stamp in blue colour of a rose in a square; underneath are the words 'Ralli and Mavrojani' arranged in a semi-circular form, and under this the number 39 in a star, and at the bottom the number 2008." On the facts of the case the lower Court (MACPHERSON, *J.*) granted an *interim* injunction to restrain the defendants from so marking their cloth, on the ground that it was a colourable imitation of the plaintiffs' mark and calculated to mislead the public; and on appeal the Court (GARTH, *C. J.*, and MARKBY, *J.*) upheld that decision so far as to continue the injunction. *Held per* GARTH, *C. J.*—If the imitation of the plaintiffs' marks generally, or the use of the number 2008 in particular, would be calculated to deceive or mislead the public, the defendants ought to be restrained from such use or imitation. Under the circumstances the use of their marks by the defendants would be calculated to deceive the public into the belief that they were purchasing goods imported by the plaintiffs. *Per* MARKBY, *J.*—The number 2008 was not part of the plaintiffs' trade mark proper: nor on the evidence was it so associated with the plaintiffs' name as to indicate to the public that the goods bearing that number came only from the plaintiffs' firm as importers; on the evidence it was merely a quality mark, and therefore not calculated to mislead the public into the belief that they were purchasing the plaintiffs' goods while in fact they were purchasing those imported by the defendants. *Semble*,—There may be a right to exclusive use of a trade mark by traders who are importers only. RALLI *v.* FLEMING
[I. L. R., 3 Calc., 417: 2 C. L. R., 93

2. ——— Right to use of trade mark.—*Rival traders.—Similarity of name.*—No trader importing goods can lawfully adopt a trade mark which is calculated to cause his goods to bear in the market the same name as those of a rival trader. TAYLOR *v.* VIRASAMI . . . I. L. R., 6 Mad., 108

3. ——— Restraining use of trade mark.—*Evidence of fraud.*—The ground upon which a person is restrained from using another's trade mark is that he is gaining an advantage by the use of a particular trade mark which is the property

TRADE MARK.—Restraining use of trade mark—*continued.*

of another. It is not necessary to prove intentional fraud, or to show that persons have been actually deceived. It is sufficient if the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. EWING *v.* GRANT, SMITH, & Co. . **2 Hyde, 185**

BALFOUR & Co. *v.* KILBURN & Co. **[1 Hyde, 270**

4. ——— **Possession and use of trade mark.**—*User in foreign market.—Abandonment.—Estoppel by conduct.*—Such possession and use of a trade mark in one market as to constitute a right in it, establishes in the owner thereof an exclusive right to that trade mark in other markets, although the owner may not have used it in such markets. To constitute a mark a trade mark, it must have been adopted as a symbol devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant. Where the plaintiffs by their conduct led the defendant to believe that they claimed no right to a certain trade mark, and that it was open to the defendant to adopt it as his own, and the defendant did adopt it, and by his industry secured a wide popularity for it in the Indian market,—*Held* that the plaintiffs were estopped from denying the defendant's right to use the trade mark in the Indian market. LAVERGNE *v.* HOOPER **[I. L. R., 8 Mad., 149**

TRADER.

See INSOLVENT ACT, S. 7. **[I. L. R., 7 Bom., 411**
I. L. R., 13 Calc., 68

See INSOLVENT ACT, S. 60. **[I. L. R., 5 Bom., 1**
2 Hyde, 1, 177
7 Bom., O. C., 22

TRADESMAN'S ACCOUNT.

See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—GENERALLY. **[I. L. R., 2 Bom., 570**

TRANSFER BY ENDORSEMENT.

See STAMP ACT, 1869, SS. 34, 41. **[I. L. R., 3 Calc., 347**

——— **Instrument of—**

See STAMP ACT, 1869, SCH. II, ART. 38. **[I. L. R., 2 Calc., 399**

TRANSFER OF CIVIL CASE.

Col.
1. GENERAL CASES 6013
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1. GENERAL CASES.

1. ——— **Power to transfer.**—*Mad. Reg. IV of 1816, s. 26—Village Munsif.—Jurisdiction.*—

TRANSFER OF CIVIL CASE—*continued.*

1. GENERAL CASES—*continued.*

Power to transfer—*continued.*

In a suit under Regulation IV of 1816, the defendant having objected to the Village Munsif trying the suit on the ground of personal hostility, the Munsif transferred the suit to another Village Munsif. *Held* that this transfer was illegal. *Per* HUTCHINS, *J.*—*Semble*,—In such a case the Village Munsif should report the facts to the District Court, and the District Judge should transfer the case for trial to another Village Munsif. LAKSHMAKKA *v.* BALI **[I. L. R., 8 Mad., 500**

2. ——— *Transfer to Munsif of Small Cause Court suit.*—A suit within the cognisance of the Small Cause Court cannot be lawfully transferred for trial to a Munsif's Court. JOOBRAJ CHOWKEEDAR *v.* WHELAN **[13 W. R., 399**

3. ——— *Case remanded for local inquiry.*—A case remanded to a District Judge for the purpose of a local inquiry cannot be transferred to a Subordinate Judge for disposal. CHOWDRY HAMEDOOLLAH *v.* MUTEEOONISSA BIBEE **[15 W. R., 574**

4. ——— *Power of Judge to transfer case under Act XVI of 1868.*—A Judge had no authority under Act XVI of 1868 to order a Subordinate Judge to try proceedings in execution of a decree which were a portion of the original civil suit tried by himself. AFTABOODDEEN AHMED *v.* MOHINEE MOHUN DOSS . . **15 W. R., 48**

5. ——— *Beng. Civil Courts Act, VI of 1871, s. 19.*—Though a Subordinate Judge may very properly, if he find the subject-matter of a suit to be of the value of less than R1,000, transfer it for trial to a Munsif, yet a Subordinate Judge is empowered under section 19, Act VI of 1871, to try causes of any value. SUFFEOOLLAH SIRCAR *v.* BEGUM BIBEE . . . **25 W. R., 219**

6. ——— *Civil Procedure Code, 1859, s. 6.—Withdrawal of suits from subordinate Courts.—Remand by higher Court.—Fresh suit.*—The power given by section 6 of Act VIII of 1859 to a Zillah Judge for the withdrawal of suits from subordinate Courts should only be exercised upon cause shown, and ordinarily not without opportunity given to the parties to the suit to be heard upon the question. The terms of section 6 were inapplicable to suits which the subordinate Court had received by order of remand from a Court to which the District Court was itself subordinate. A suit sent by the High Court to a subordinate Court under a remand to the High Court by Her Majesty's order in Council, and in which, under the Council's remand order, the plaint has been amended, a new statement filed, and new issues framed, is substantially a new suit. MAHOMED ZAHOOR ALI KHAN *v.* RUTTA KUNWOOR . . . . . **2 N. W., 481**

7. ——— *Civil Procedure Code, 1859, s. 6.—Transfer of part-heard case to be*

TRANSFER OF CIVIL CASE—*continued.*

1. GENERAL CASES—*continued.*

Power to transfer—*continued.*

completed in another Court.—Section 6 of Act VIII of 1859 did not authorise the taking a case in progress of trial off the file of a Subordinate Judge in order that it might be completed by the Judge himself, or some other Court. It is clear that such transfer must take place on the institution of the suit. RAM NATH *v.* GOWHUR . . . **2 N. W., 230**

DUMBER SAHOO *v.* JUGDHAREE . **13 W. R., 398**

ABDOOL HYE *v.* MACRAE . . **23 W. R., 1**

8. ——— *Civil Procedure Code, 1859, s. 6.—Transfer after evidence has been taken.—Quære,*—Whether a case could be transferred from one Court to another, under section 6, after the evidence had been taken in the former Court. ASMEDH KOONWAR *v.* TAYLER. KHORSHED ALI *v.* TAYLER . . . . **W. R., 1864, 15**

9. ——— *Civil Procedure Code, 1859, s. 6.—Suit brought whilst Court is closed for vacation.*—The Court of the Principal Sudder Ameen of Thana being closed during vacation, a plaint which, under section 6 of the Civil Procedure Code, ought to have been instituted in that Court, was, by the order of the District Judge, referred for trial to the Assistant Judge, entered in the register of suits in the Judge's Court, and tried by the Assistant Judge. *Held,* reversing the decree of the District Court in appeal, that it was not lawful for the Judge to refer the suit, without its having first been instituted in the Principal Sudder Ameen's Court. MOTILAL RAMPAS *v.* JAMNADAS JAVERDAS . . **2 Bom., 42: 2nd Ed., 40**

10. ——— *Civil Procedure Code, 1859, s. 6.—District Court.—Power to receive plaint when lowest Court closed.*—Where a plaintiff presented a plaint to the District Court, the Subordinate Judge's Court, in which he ought to have presented it, being then temporarily closed, it was held that the District Court could not be considered a Court of first instance, competent to receive the plaint. The decision in *In re Ganesh Sadashiv, 5 Bom., A. C., 117,* overruled; and *Motilal Ramdas* v. *Jamnadas Javerdas, 2 Bom., A. C., 42,* followed. RAMAYA ELAPA *v.* MUHAMADBHAI . **10 Bom., 495**

11. ——— *Civil Procedure Code, 1859, ss. 5 and 6.—Jurisdiction.—Held* that though both suits were properly cognisable by the Court at Cawnpore, yet the Sudder Court's order, which it was competent to pass under section 6, Act VIII of 1859, gave jurisdiction to the Principal Sudder Ameen of another district, whose decision was not liable to be set aside for want of jurisdiction, in reference to the provisions of section 5 of that enactment. RAM BUX *v.* GIRDHAREE LALL **[1 Agra, 178**

12. ——— *Evidence recorded by one officer and decision given by another.*—A suit for enhancement was filed under Act X of 1859, in the Court of a Deputy Collector. The issues were framed and the evidence recorded by an Assistant Collector, apparently not invested with the powers of a Deputy Collector, who wrote a report recommending the mode in which the suit should be disposed of. It was then disposed of by another Deputy Collector who was probably acting at the time as Collector. *Held* that there was no power to transfer the case, and that the procedure by which the suit was heard by one officer and decided by another was illegal. HURDYAL OOPUDHYA *v.* MAHOMED NAHEM **[1 N. W., Part II, p. 19: Ed. 1873, 79**

13. ——— *Civil Procedure Code, 1859, ss. 5 and 6.*—Where a District Court had jurisdiction under section 5, Act VIII of 1859, to try a suit, and defendant made no application to the Judge, or communication to the plaintiff, with a view to its being tried in a different district, the case was held to be not one for the exercise of any special power by the High Court for that purpose. KRISTO DASS KOONDOO *v.* ISSUR CHUNDER CHOWDHRY **[11 W. R., 189**

14. ——— *Civil Procedure Code, 1859, s. 6.—Notification giving jurisdiction as Small Cause Court.—Power to transfer pending cases.*—Where, on 3rd March 1870, the Government issued a notification under sections 4 and 5, Madras Act IV of 1863, investing the Additional Principal Sudder Ameen of Mangalore with exclusive jurisdiction to try Small Cause suits for sums under R500 within the jurisdiction of the District Munsif,—*Held* that the Munsif had no power after the notification to transfer to the Principal Sudder Ameen an application pending before himself at the date of the notification under section 6 of the Civil Procedure Code, 1859, the notification not being retrospective in its operation. NARAYANA MALYA *v.* GOVIND SHETTY . . . . . **6 Mad., 18**

15. ——— *Civil Procedure Code, 1859, s. 13.—Power of Sudder Courts.*—Section 13, Act VIII of 1859, enacted that, where a suit was brought for immoveable property situated within districts subject to different Sudder Courts, the Judge in whose Court the suit was brought should apply to the Sudder Court to which he was subject for authority to proceed, and the Sudder Court to which the application was made, with the concurrence of the other Sudder Court within whose jurisdiction the property was partly situated, might give authority to proceed. But no power was expressly given in the section cited, or elsewhere in the Act, to direct the transfer of a suit brought in a Court subordinate to one Sudder Court to a Court subordinate to another Sudder Court. *Quære,*—Whether Sudder Courts acting in concurrence had power to make such a transfer. SKINNER *alias* NAWAB MIRZA *v.* ORDE. **[I. L. R., 2 All., 241**

16. ——— *Civil Procedure Code, 1859, s. 13.—Family domains of the Maharaja of Benares.—Held,* following S. A. No. 969 of 1877, decided the 14th December 1877, that the

TRANSFER OF CIVIL CASE—*continued.*

1. GENERAL CASES—*continued.*

Power to transfer—*continued.*

provisions of section 13 of Act VIII of 1859 were not applicable in a case in which a portion of the immoveable property was situate within the limits of the family domains of the Maharaja of Benares, those domains not constituting a district within the meaning of that section. RAGHU NATH DASS *v.* KAKKAN MAL . . . I. L. R., 3 All., 568

17. ——— *Civil Procedure Code, 1877, s. 24.—Place of suing.—grounds for transfer.*—Section 24 of the Civil Procedure Code does not empower a High Court to transfer a suit instituted within its own jurisdiction to the jurisdiction of another High Court, but only to declare in which Court a suit shall proceed, and, if necessary, to stay all further proceedings within its own jurisdiction. The defendants in a suit instituted at Mainpuri, who resided and carried on business at Surat, applied under section 24 of the Civil Procedure Code that the suit might be tried at Surat, on the ground that it would be tried with greater convenience to them at that place. *Held* that there being no balance in favour of either justice or convenience on the side of the Surat Court, the suit should proceed at Mainpuri. TULA RAM *v.* HARJIWAN DASS [I. L. R., 5 All., 60

18. ——— *Civil Procedure Code, 1877, s. 25.—Power of High Court.*—The High Court cannot make an order of transfer of a case under section 25 of the Code of Civil Procedure unless the Court from which the transfer is sought to be made has jurisdiction to try it. PEARY LALL MOZOOMDAR *v.* KOMAL KISHORE DASSIA [I. L. R., 6 Calc., 30

19. ——— *Civil Procedure Code, 1877, s. 25.—Transfer from Court in which a suit has been wrongly instituted.*—A suit for the infringement of certain inventions, instead of being instituted in the Court having, by virtue of section 22 of Act XV of 1859, jurisdiction to entertain it, was instituted in a Court subordinate to such Court not having such jurisdiction. The Court having jurisdiction to entertain such suit, at the joint request of the parties, transferred it for trial to itself under section 25 of the Civil Procedure Code, and tried it. *Held* in the High Court that, inasmuch as the parties had assented to the transfer of the suit, and its transfer brought it into the right Court, the fact that the suit had been originally instituted in the wrong Court did not render the transfer illegal, and the Court having jurisdiction had properly tried the suit. PETMAN *v.* BULL . . . I. L. R., 5 All., 371

But held by the Privy Council (reversing this decision) that under section 25 of the Civil Procedure Code the superior Court cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it. *Peary Lall Mozoomdar* v. *Komal Kishore Dassia, I. L. R., 6 Calc., 30,* approved. A suit having been instituted in the Court of the Subordinate Judge, who was incompetent to try it, the case was transferred by consent of parties to the Court of the District Judge for convenience of trial. *Held* that such transference was incompetent, and that such consent did not operate as a waiver of the plea to the jurisdiction which was taken in the defendant's written statement and subsequently insisted upon. LEDGARD *v.* BULL [L. R., 13 I. A., 134: I. L. R., 9 All., 191

20. ——— *Civil Procedure Code, 1882, s. 331.—Claim below ordinary pecuniary limit.*—By virtue of section 647 of the Code of Civil Procedure, a superior Court may, for sufficient cause, transfer a claim, registered under section 331, to a subordinate Court for trial. SITHALAKSHMI *v.* VYTHILINGA . . . I. L. R., 8 Mad., 548

21. ——— *Reasons for transfer.—Amending issues.—Procedure on transfer.*—The mere transfer of a suit for the convenience of the public, or for the acceleration of business, from one subordinate Court to another, does not affect the authority of the Judge of the District Court to transfer it to his own file, or to another Court, or to retransfer it, if he see sufficient cause for so doing; nor would the circumstance that a case had been up on appeal to the High Court on a preliminary point, and been remanded for a trial on the merits, limit the authority of the District Court Judge to bring it upon his own file, or to transfer it to the file of a Court other than that in which it was instituted. The omission of the Judge to assign his reason for transferring the case does not vitiate his proceeding. When a Judge transfers a case to his own file, he is at liberty to amend the issues first laid down, and to raise additional issues, and to go into the whole case, except upon any question upon which there has been a judicial finding. TARUCKNATH MOOKERJEE *v.* GOUREE CHURN MOOKERJEE . 3 W. R., 147

22. ——— **Procedure on transfer.**—*Evidence of witnesses.*—Where a suit which was filed originally before a Principal Sudder Ameen, who had fixed the issues and recorded the evidence of witnesses, is transferred by a Judge to his own file, the Judge, his Court being a Court of original jurisdiction, ought to have the witnesses before him and take their evidence *de novo.* UNNOPOORNA *v.* HURBULLUB SINGH . . . . 8 W. R., 465

23. ——— *Civil Procedure Code, 1882, s. 25.—Court to which suit is transferred not taking fresh evidence.*—Where the trial of a suit was commenced by a Subordinate Judge and then transferred by the District Judge to his own file under section 25 of the Civil Procedure Code, and the latter did not retake the evidence, but dealt with the case as it came to him from the Subordinate Judge and dismissed the suit,—*Held* that the District Judge had not tried the case within the meaning of section 25 of the Code. BANDHU NAIK *v.* LAKHI KUAR [I. L. R., 7 All., 342

24. ——— *Case referred to arbitration.—Power of Judge to decide after trans-*

TRANSFER OF CIVIL CASE—*continued.*

1. GENERAL CASES—*continued.*

Procedure on transfer—*continued.*

fer.—A case having been withdrawn by the Judge, for trial in his own Court, from the Principal Sudder Ameen's Court, where it had already been referred to arbitration,—*Held* that the Judge was quite competent to decide the case himself, without necessarily being bound also to refer it to arbitration. ABOO MAHOMED *v.* KISHEN MOHUN SURMA [6 W. R., 290

25. ——— Application for transfer.—*Transfer of several separate suits.—Separate applications.*—Where it is desired to have a number of suits transferred, a separate application should be made in each case for transfer. KISHOREE LAL *v.* LUCHMUN DOSS . . . 2 N. W., 147

2. LETTERS PATENT, HIGH COURT, CL. 13.

26. ——— Transfer to High Court.—*Jurisdiction of High Court, Calcutta.—Sessions Court, Allahabad.*—The High Court at Calcutta had no jurisdiction over the Court of the Sessions Judge at Allahabad, such Court not being subject to the superintendence of the High Court under the 13th section of the Charter. GREAT EASTERN HOTEL COMPANY *v.* SECRETARY OF STATE FOR INDIA [1 Ind. Jur., N. S., 219

27. ——— *Ground for transfer.—Prejudice to interests of party.*—A suit will not be removed from a Zillah Court in which it was instituted, to the ordinary original jurisdiction of the High Court, unless it be clearly shown that the interests of the party petitioning for such removal will be prejudiced by a non-removal. BORRADAILE *v.* GREGORY . . . Bourke, Ex. O. C., 1

28. ——— *Power to transfer.—Grounds for transfer.—Inconvenience.—Expense.*—The 13th section of the Letters Patent (1865) of the High Court at Fort William gives the Court power to order a suit to be transferred for trial only where the transfer is agreed on by the parties, or for the purposes of justice; and in the absence of agreement it must be made out that there will be inconvenience amounting to this, that, if the case be tried in the Court in which it was originally laid, the trial will be unsatisfactory. The mere fact that it would be less expensive to try the case in the High Court is not sufficient of itself for the Court to act upon and order the case to be transferred. OJOODERAM KHAN *v.* NOBINMONEY DOSSEE [1 Ind. Jur., N. S., 396

29. ——— *Ground for transfer.—Nature of questions for disposal.—Conduct of Judge.*—On an application under the Letters Patent, 1865, clause 13, for the removal of a suit,—*Held* that, having regard to the whole circumstances connected with the case from the beginning, the questions to be disposed of, and the conduct of the Judge before whom the proceedings were, it was proper and necessary for the purposes of justice that the suit should

TRANSFER OF CIVIL CASE—*continued.*

2. LETTERS PATENT, HIGH COURT, CL. 13—*continued.*

Transfer to High Court—*continued.*

be removed. THAKOOR KAPILNAUTH SAHAI DEO *v.* GOVERNMENT . . . 10 B. L. R., 168

30. ——— *Ground for transfer.—Nature of questions for disposal.—Local prejudice.*—The Court refused to transfer a case from the mofussil, where there were, among other alleged reasons, suggestions that the plaintiff's case might be prejudiced by being tried in the mofussil, and that difficult and intricate questions of law would arise in the case, the Court not being satisfied by the evidence that such reasons existed. COURJON *v.* COURJON . . . . . 9 B. L. R., 10

31. ——— *Ground for transfer.—Consent of parties.—Expense.*—A suit for an account and for other relief relating to immoveable property situated without the local limits of the ordinary original civil jurisdiction of the High Court, was instituted against several defendants in the Court of the Subordinate Judge of the district within which the property was situated. Upon a petition by one of the defendants, consented to by most of the other defendants and by the plaintiff, the High Court ordered the suit to be removed from the Court in which it had been instituted, to be tried and determined by the High Court as a Court of extraordinary original jurisdiction, on the grounds that the parties and the witnesses resided in Calcutta, that it would be cheaper to try the suit in Calcutta, and that all parties appearing on the motion desired a transfer. PAYN *v.* ADMINISTRATOR GENERAL OF BENGAL I. L. R., 6 Calc., 766 : 6 C. L. R., 221

32. ——— *Ground for transfer.—Difficult questions of English law in case.*—The Court will order a suit to be removed from the mofussil, and tried in the High Court, when difficult points of English law arise, and when generally it appears to be an unfit case to be tried in the mofussil. DOUCETT *v.* WISE . 1 Ind. Jur., N. S., 94

33. ——— *Ground for transfer.—Questions of English law.—Parties.— British subjects and residents of Calcutta.*—Where a case was originally tried by a Zillah Judge, and on appeal to the High Court on its appellate side the Judges of that Court remanded it to the Court below for a fresh trial, intimating that it was a proper case to be transferred under clause 13 of the Letters Patent constituting the High Court; and where it appeared that questions of English law were involved in the case, that the witnesses and parties were chiefly British subjects, and the plaintiff an officer of the High Court and resident in Calcutta, the Court ordered the case to be transferred for trial to the High Court, original jurisdiction. DOUCETT *v.* WISE [1 Ind. Jur., N. S., 227

34. ——— *Ground for transfer.—Sale in execution of decree.—Order winding up company.*—On 25th October 1870 a petition for the winding up of the *B. T. E.* Company of

TRANSFER OF CIVIL CASE—*continued.*

2. LETTERS PATENT, HIGH COURT, CL. 13 —*continued.*

Transfer to High Court—*continued.*

Assam was presented to the Court of Chancery in England by one of the shareholders of the Company, and a provisional liquidator was appointed. On 5th November, at an extraordinary meeting of the Company, it was resolved that the Company should be wound up, and liquidators were appointed. On 12th November, the petition for winding up came on for hearing, and an order was made that the voluntary winding up should continue subject to the supervision of the Court.. On 18th November, by deed under the hands and seals of the liquidators, *M.* was appointed their attorney in India. On 27th October certain immoveable properties in Assam belonging to the Company were attached in execution of decrees in certain suits in the Court of the Munsif of Debroghur. On 9th December the properties were put up for sale, and purchased at prices which it was alleged were considerably under their value. Applications were made in the Munsif's Court at Debroghur by the purchasers for confirmation of the sales, which applications were opposed by *M.*, and pending the Munsif's decision an application was made to the Deputy Commissioner of Luckimpore for an order to stay all proceedings in the decree-suits, on the ground of the order for winding up the Company of 12th November, which application was refused on 15th February 1871. On 16th February 1871 the Munsif made an order confirming the sales. *M.* thereupon petitioned the High Court for the removal of the suits from Assam to the High Court, to be tried in its extraordinary original civil jurisdiction, on the ground that no appeal would lie against the order of 15th February, refusing to stay the proceedings in the suits; and that if an appeal should be preferred to the Deputy Commissioner from the order of the Munsif confirming the sales, his decision would be final. The application was opposed on behalf of the purchasers. *Held,* the Munsif not having had notice of the winding-up order of 12th November, had power to sell the property on 9th December, and the sale having actually taken place, and there being nothing to show that there was any irregularity in the proceedings, the High Court would have no power, if the cases were brought down, to set aside the sale. This, therefore, was not a proper case for the exercise of the power which the High Court possesses under clause 13 of the Letters Patent. IN THE MATTER OF DECREE-SUITS IN THE COURT OF MUNSIF OF DEBROGHUR . . **7 B. L. R., 305**

35. ———— *Law governing case.*—Where a suit was originally instituted in the Hooghly Court, and *H. S.*, who was a defendant, and not subject to the jurisdiction of that Court, joined in an application to have the case tried by the High Court in the exercise of its extraordinary original civil jurisdiction, which application was granted,—*Held per* PHEAR, *J.*, that the suit must be treated as if the plaint had been originally filed in the High Court, the proceedings in the Hooghly Court being without jurisdiction, and the cause of action having

TRANSFER OF CIVIL CASE—*continued.*

2. LETTERS PATENT, HIGH COURT, CL. 13 —*continued.*

Transfer to High Court—*continued.*

arisen wholly within the jurisdiction of the High Court. *Held* on appeal by PEACOCK, *C. J.*, and MACPHERSON, *J.*, that the defendant *H. S.*, by joining in the application to have the suit removed to the High Court, admitted the jurisdiction of that Court to try the suit in the exercise of its extraordinary original civil jurisdiction, and could not afterwards dispute the jurisdiction. The law, therefore, to be administered by the High Court must be the same law and equity which ought to have been applied if the suit had been tried in the Court at Hooghly. *Per* MACPHERSON, *J.*—The law which would have been applicable to the case if it had been tried at Hooghly, is practically the same as the English law, whatever may be the nationality of the parties. GROSE *v.* AMIRTAMAYI DASI

[4 B. L. R., O. C., 1: 12 W. R., O. C., 13

36. ———— *Application for transfer.—Before whom application should be made.* An application to the High Court to remove a case from a District Court, and to try it as a Court of extraordinary original jurisdiction, under section 13 of the Charter, should be made to a Judge sitting on the Original Side of the Court. DOUCETT *v.* WISE . . . . . **4 W. R., Mis., 7**

3. GROUND FOR TRANSFER.

37. ———— **Expense, inconvenience, or other good reason.**—*Civil Procedure Code (Act XIV of 1882), s. 23.—Practice.*—Section 23 of Act XIV of 1882 is only intended to provide for those cases where, on the ground of expense or convenience, or some other good reason, the Court thinks that the place of trial ought to be changed. Parties desirous of obtaining the transfer of a case from one *forum* to another ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence; they should further state what are the issues and the evidence required, and then satisfy the Court that, either on the ground of expense or convenience, or otherwise, the place of trial ought to be changed. KHATIJA BIBI *v.* TARUK CHUNDER DUTT

[I. L. R., 9 Calc., 980: 13 C. L. R., 182

38. ———— **Portion of property in another jurisdiction.**—*Civil Procedure Code, 1877, s. 23.—Procedure.*—The fact that a portion of property, the whole of which is sued for in the Court of the Munsif of A., is of less value than the remaining portion which is within the jurisdiction of the Munsif of B., is no sufficient ground for an application under the Code of Civil Procedure, section 23, for a transfer to the latter Court. A party applying under section 23, Act X of 1877, must first of all give notice to the other party or side; the application should then be received by the Munsif and transmitted to the High Court through the District Court. PURRUNJOTE *v.* DEON PANDAY . **2 C. L. R., 352**

TRANSFER OF CRIMINAL CASE.

Col.
1. GENERAL CASES 6023
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See APPEAL IN CRIMINAL CASES—ACTS—BURMA COURTS ACT.
[I. L. R., 4 Calc., 667

See CASES UNDER COMPLAINT—POWER TO REFER TO SUBORDINATE MAGISTRATE.

1. GENERAL CASES.

1. ——— **Power to transfer.**—*Criminal Procedure Code, 1882, s. 178.—Reference to High Court.—Burma Courts Act (Act XVII of 1875), s. 80.*—The Local Government has no power, under section 178 of the Code of Criminal Procedure, to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon; but the Local Government has the power to transfer a case from the district of Rangoon to the Sessions division of Pegu. QUEEN-EMPRESS *v.* NGA THA MOUNG
[I. L. R., 10 Calc., 643

2. ——— *Criminal Procedure Code, 1882, s. 526.—District Magistrate and Civil and Sessions Judge (qua Magistrate) of Bangalore subordinate to High Court.*—The District Magistrate and the Civil and Sessions Judge of the civil and military station at Bangalore are Magistrates subordinate to the High Court at Madras within the meaning of section 526 of the Code of Criminal Procedure. The High Court, therefore, has power to transfer a case from the Courts of those Judges to any other Criminal Court. Under the circumstances disclosed, the High Court transferred this case. SCOTT *v.* RICKETTS . I. L. R., 9 Mad., 356

3. ——— *Power of High Court, Bombay.—Criminal Procedure Code, 1882, s. 526.—Act III of 1884, s. 11.—Cantonment Magistrate, Secunderabad.*—The High Court of Bombay having been vested by notification of the Governor General of India in Council, No. 178, of 23rd September 1874, with original and appellate criminal jurisdiction over European British subjects, being Christians, resident, amongst other places, at Secunderabad, outside the Presidency of Bombay and within the territories of His Highness the Nizam of Hyderabad, the Cantonment Magistrate of Secunderabad in his character of a District Magistrate is subordinate to the High Court in criminal matters relating to Christian European British subjects in Hyderabad within the contemplation of section 526 of the Code of Criminal Procedure, Act X of 1882, as amended by Act III of 1884, section 11; and the High Court possesses, by virtue of the appellate jurisdiction so vested in it, the power of transferring a criminal case pending in the Cantonment Magistrate's Court either to itself or to any Criminal Court of equal or superior jurisdiction. The High Court by an order under section 526 of the Criminal Procedure Code

(Act X of 1882) transferred the present case of defamation from the Court of the Cantonment Magistrate at Secunderabad to the High Court for trial, on the ground that no machinery for a trial by jury existed at Secunderabad. QUEEN-EMPRESS *v.* EDWARDS . . . . I. L. R., 9 Bom., 333

4. ——— *Power of High Court, Bombay.—Aden Act II of 1864.—Transfer of case from Court of Political Resident at Aden.—Criminal Procedure Code, 1882, s. 526.*—A prisoner charged with having committed murder at Perim was committed by the Magistrate there on the 26th August 1885, for trial before the Political Resident at Aden, by whom he was convicted and sentenced to death on the 14th September 1885. On the 26th January 1886, the High Court of Bombay reversed the conviction and sentence, on the ground that the Court of the Resident had no jurisdiction over the Island of Perim, and that the Resident, not having been appointed a Judge of a Court of Session for that island, was not competent to try the prisoner. The High Court ordered a re-trial before a competent Court. On the 10th February 1886 the Government of Bombay issued the notification (No. 823) above set forth. On the 11th March 1886 an application was made to the High Court of Bombay for the transfer of the case to another Court of Session or to the High Court for trial. *Held* that Perim is a Sessions Division, and that, after the establishment, under the Code of Criminal Procedure, of a Court of Session for the Perim Sessions Division and the appointment of the Resident at Aden as Sessions Judge of that Court, the accused stood properly committed to a Court of Session. The High Court, therefore, could transfer the case from that Court, under section 526 of the Code, to any other Court of equal or superior jurisdiction, or to the High Court of Bombay. *Per* BIRDWOOD, *J.*—The High Court cannot, under section 526 of the Criminal Procedure Code (Act X of 1882), any more than under section 25 of the Civil Procedure Code (Act XIV of 1882), direct the transfer of a case, which is not properly before a subordinate Court of competent jurisdiction, to receive and try it. *Peary Lall Mozoomdar* v. *Komul Kishore Dossia, I. L. R., 6 Calc., 30,* followed; *Queen-Empress* v. *Thaku, I. L. R., 8 Bom., 312,* distinguished. *Per* JARDINE, *J.*—After the High Court had annulled the proceedings in the Court of the Resident at Aden as without jurisdiction, the case could not be treated as still pending in his Court; and as there was no Court of Session in existence at the time of the commitment, it necessarily followed that the case remained in the Magistrate's Court. But, whether the case was considered as pending in the Court of a Magistrate or of a Resident, or of a Sessions Judge, the High Court had the power to transfer it, and that under the circumstances the case should be so transferred to the High Court for trial. QUEEN-EMPRESS *v.* MANGAL TEKCHAND . . . . I. L. R., 10 Bom., 274

TRANSFER OF CRIMINAL CASE—*continued.*

1. GENERAL CASES—*continued.*

5. ——— **Transfer to High Court.**—*High Courts' Criminal Procedure Act, X of 1875, s. 147 (Criminal Procedure Code, 1882, s. 526) and s. 115.—"Case" referred to High Court.—Reference to Police Magistrate.—Semble,*—That the "case" mentioned in section 147 of the High Court's Criminal Procedure Act, X of 1875, must refer to some question in the nature of a criminal proceeding, and not to a matter of a *quasi*-civil character, such as the reference to a Police Magistrate contemplated in section 115. REG. *v.* RAMADAS SAMALDAS. EX PARTE MADAVJI DHARAMSI . . . . . **12 Bom., 217**

6. ——— *High Courts' Criminal Procedure Act, 1875, s. 147 (Criminal Procedure Code, 1882, s. 526).—"Other proceeding."—Commitment, Application to quash.—24 & 25 Vict., c. 104, ss. 13 and 15.*—The words "or other proceeding" in section 147 of Act X of 1875 did not include a commitment, and an application to have a commitment quashed could be entertained under the provisions of that section. IN THE MATTER OF THE PETITION OF CHAROO CHUNDER MULLICK. CHAROO CHUNDER MULLICK *v.* EMPRESS **[I. L. R., 9 Calc., 397**

7. ——— *Acquittal.—Presidency Magistrates Act (IV of 1877), s. 181.—Calcutta Municipal Act (Bengal Act IV of 1876), ss. 75, 79.*—The powers of interference given to the High Court by section 147 of the High Courts' Criminal Procedure Act, were not intended to be exercised in the case of an acquittal by the Magistrate, but only in the case of convictions or other orders whereby a defendant is aggrieved or injured. CORPORATION OF CALCUTTA *v.* BHEECUNRAM NAPIT *alias* BHEECUN NAPIT . **I. L. R., 2 Calc., 290**

8. ——— *High Courts' Criminal Procedure Act, 1875, s. 147 (Criminal Procedure Code, 1882, s. 526.—Notice to prosecutor.—Penal Code, ss. 292 and 294.—Specific charge.—Procedure on transfer to High Court.*—In an application for the transfer of a case under section 147, Act X of 1875, in which the prisoner has been convicted and is undergoing imprisonment, it is in the discretion of the Court to order, for sufficient *primâ facie* cause shown, that the case be removed without notice to the Crown. *Semble,*—A charge under sections 292 and 294 of the Penal Code should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene; and the Magistrate, in convicting, should in his decision state distinctly what were the particular representations and words which he found on the evidence had been exhibited and uttered, and which he adjudged to be obscene within the meaning of those sections. Where no such specific decision has been given, the High Court, when the case has been transferred under section 147, Act X of 1875, may either try the case *de novo*, or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained. QUEEN *v.* UPENDRONATH DOSS **[I. L. R., 1 Calc., 356**

TRANSFER OF CRIMINAL CASE—*continued.*

1. GENERAL CASES—*continued.*

Transfer to High Court—*continued.*

9. ——— *High Courts' Criminal Procedure Act, 1875, s. 147.—Transfer of case before Magistrate.—Power to issue mandamus.*—A charge was made against the accused of using criminal force under section 141 of the Penal Code. The Police Magistrate heard the evidence for the prosecution, and, without disbelieving it, decided it did not amount to the offence charged. *Held* that, assuming that an error of law had been committed, the High Court had no power to issue a *mandamus* to the Magistrate to commit the defendants; it was not a case where the Magistrate had declined jurisdiction; he had exercised his jurisdiction and heard the case. *Held*, also, it was not a case which the Court could transfer under section 147 of the High Courts' Criminal Procedure Act. IN THE MATTER OF THE EMPRESS ON THE PROSECUTION OF MALCOLM *v.* GASPER . . **I. L. R., 2 Calc., 278**

10. ——— *High Courts' Criminal Procedure Act, 1875, s. 147.—Case transferred to High Court.—Refund of fine on quashing conviction.—Notes of evidence taken by Magistrate.*—The High Court had no power, under section 147, Act X of 1875, to order a fine to be refunded on quashing a conviction. The Court in this instance decided whether the case should be transferred under section 147 on the notes of the evidence taken by the Magistrate at the trial. QUEEN ON THE PROSECUTION OF MORAD ALI *v.* JEEBUN BUX **[I. L. R., 1 Calc., 354**

11. ——— *High Courts' Criminal Procedure Act, 1875, s. 147.—Costs.—Police Magistrates.—Notes of evidence.*—In a case transferred to the High Court under section 147, Act X of 1875, the Court had no power to give costs. *Semble,*—The case may be transferred after final determination by the Magistrate. Notes of the proceedings before them should be taken in all cases by the judicial officers of all Criminal Courts subject to the Act. IN THE MATTER OF LOUIS. IN THE MATTER OF BENGAL ACT VI OF 1866 **[15 B. L. R., Ap., 14**

12. ——— **Power of District Magistrate.**—*Power to call for case.—Procedure when, having called for it, he finds it out of his jurisdiction.*—The Magistrate of the district has authority to call up to his own Court any criminal case without limitation as to the stage of proceeding at which it may be called. If the Magistrate, having in the exercise of his authority withdrawn any case, finds that it did not come within the jurisdiction of his Magistracy, he would not merely be competent but bound to refuse to proceed further with the case. VILAETEE KHANUM *v.* MEHER ALI **[24 W. R., Cr., 4**

13. ——— *Held* that, although the Magistrate of a district is competent to order the removal of any particular case from the

TRANSFER OF CRIMINAL CASE—*continued.*

1. GENERAL CASES—*continued.*

Power of District Magistrate—*continued.*

file of a subordinate Court to his own, it is doubtful whether he can by general proceeding direct the transfer of cases which have no existence, and which are not pending before any of his subordinates. GOVERNMENT *v.* GIRDHAREE LALL [1 Agra, Cr., 24

14. ——— Application for transfer.—*Criminal Procedure Code, 1872, s. 64.—Power of Judge acting on English committee.*—An application for the transfer of a case under section 64 of the Criminal Procedure Code should be made, not by letter to the English Department of the High Court, but before the Court in its judicial capacity, and should be supported by affidavits or affirmation in the usual way. QUEEN *v.* ZUHIRUDDIN [I. L. R., 1 Calc., 219: 25 W. R., Cr., 27

15. ——— Notice of transfer.—*Subordinate Magistrates.—Criminal Procedure Code (Act X of 1872), s. 48.—Notice to the parties before the transfer is made.*—Before a Magistrate of a district can transfer a case from a Court subordinate to him to any other subordinate Court, notice of such intended transfer should be served upon the parties, so as to enable any or either of the parties to come forward and show cause why such transfer should not be made. IN THE MATTER OF THE PETITION OF TEACOTTA SHEKDAR. TEACOTTA SHEKDAR *v.* AMEER MAJEE [I. L. R., 8 Calc., 393: 10 C. L. R., 239

16. ——— Transfer of partly-heard case.—*Hearing of evidence.*—Where a case which has been partly heard by one officer is transferred to another officer for trial, the latter should hear all the evidence in the case before deciding it. KOPIL NATH SAHI *v.* KONEERAM . . 14 W. R., Cr., 3

QUEEN *v.* KULLIAN SINGH . 2 N. W., 468

The High Court, however, declined to interfere in a case of this sort, as the prisoners did not appeal or raise any objection to the trial on this ground. KOPIL NATH SAHI *v.* KONEERAM [14 W. R., Cr., 3

2. LETTERS PATENT, HIGH COURT, CL. 29.

17. ——— Transfer to High Court.—*Power to transfer.—Criminal Procedure Code, 1872, s. 64.*—Section 29 of the Letters Patent of 1865 empowers the High Court to transfer for trial before itself an appeal to a Court of Session from the sentence of a District Magistrate, and this power was not affected by section 64 of the Code of Criminal Procedure, 1872, which authorised the High Court to transfer an appeal from one subordinate Court of criminal jurisdiction to another. SITAPATHI NAYUDU *v.* QUEEN [I. L. R., 6 Mad., 32

18. ——— Power to transfer.—*" Competency " to investigate case.*—The construction of clause 29 of the Letters Patent, 1865, is, that the High Court has power, if in its discretion it thinks right to exercise it, to transfer the investigation or trial of any criminal offence committed in Calcutta to a mofussil Court, which is otherwise competent to try it, or to direct the trial by the High Court of an offence committed in the mofussil. " Competent to investigate it " does not include competency as regards local jurisdiction, but only competency with regard to the offender, the nature of the offence, and the punishment. QUEEN *v.* NABADWIP GOSWAMI [1. B. L. R., O. Cr., 15: 15 W. R., Cr., 71, note

19. ——— Power to transfer.—*Power of single Judge on original side of High Court.*—On an application made for the transfer of a case from the Sessions Court at Patna for trial by the High Court at Calcutta, on the grounds mainly that all but one of the charges against the prisoners were for offences committed in Calcutta; that the selection of Patna as the place of trial was calculated to prejudice the prisoners; that the police at Patna were getting up the case against the prisoners by improper and illegal means; that by these means was created such a feeling of dread and insecurity among the witnesses and others in Patna as would prevent a fair trial from taking place there; that some of the witnesses for the defence, although willing to give evidence in Calcutta, refused to go to Patna to give evidence; and that many difficult points of law were likely to arise at the trial; but these allegations were denied by the affidavits filed in opposition to the application,—*Held* (MACPHERSON, *J.*, doubting), the High Court had power under clause 29 of the Letters Patent to transfer the case for trial by itself. The Court, however, refused the application, on the ground that a sufficient case had not been made out for the exercise of the power of the Court. *Per* PHEAR, *J.*—A single Judge, sitting on the original side of the Court, has power to entertain an application for the removal of a criminal case from a Court in the mofussil to the High Court in the exercise of its extraordinary original criminal jurisdiction. QUEEN *v.* AMEER KHAN [7 B. L. R., 240: 15 W. R., Cr., 69

3. GROUND FOR TRANSFER.

20. ——— Nature of grounds for transfer.—*Transfer from one Magistrate to another.*—The High Court will not, except on very strong and very clear grounds, transfer a case from one Magistrate's Court to that of another Magistrate. IN THE MATTER OF THE PETITION OF SHANKAR ABAJI HOSHING: REG. *v.* SHANKAR ABAJI HOSHING . . . . 6 Bom., Cr., 69

21. ——— Probability of unfair trial.—*Transfer from one Magistrate to another.*—It is only when there is reason to suppose that the prisoner

TRANSFER OF CRIMINAL CASE—*continued.*

3. GROUND FOR TRANSFER—*continued.*

Probability of unfair trial—*continued.*

will not have a fair trial that the High Court will transfer a case from one magisterial officer to another. QUEEN *v.* KISTO CHUNDER GHOSE [2 W. R., Cr., 58

22. ———— *Proof of grounds for transfer.—Grounds necessary to obtain transfer when application is opposed by accused.*—Before the transfer of a case from one Criminal Court to another can be made, in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district in which the case is ordinarily triable. IN THE MATTER OF THE PETITION OF THE LEGAL REMEMBRANCER. EMPRESS *v.* NOBO GOPAL BOSE [I. L. R., 6 Calc., 491

23. ———— **Prosecution initiated by Magistrate.**—*Conviction before same Magistrate.—Transfer of appeal from Magistrate to Sessions Judge.*—Where the Magistrate of the district had procured the initiation of a number of prosecutions against the same person, and one of them which had resulted in conviction came up before him in appeal, the High Court, considering that it was not altogether seemly that he should hear the appeal, ordered its transfer to the Sessions Judge. RAMZAN ALI *v.* DURPO KOMILLA . 24 W. R., Cr., 58

24. ———— **Judge forming premature opinion.**—*Convenience.—Relieving judicial officer of case he wishes not to try.*—The High Court does not exercise its powers of transfer in a case of forgery or perjury solely on the ground that the Judge who is to try the case has formed an opinion that the document has been forged or the perjury committed. But when the transfer can be made without risk of any improper interference with the course of justice, and without much inconvenience to the parties and witnesses, the transfer would be proper, not only as a fair concession to the accused person, but as a means of relieving the Judge from a position which he would himself desire to avoid. IN THE MATTER OF THE PETITION OF ARUNACHALLA REDDI . . . . . 5 Mad., 212

25. ———— **Illegal procedure by Magistrate.**—*Magistrate antagonistic to accused.—Power of High Court.*—Where the procedure in the case of a person charged with an offence was found to be irregular and illegal, and the Magistrate was prejudiced and antagonistic to the prisoner, the High Court made an order (as in the *Bancoorah case, 4 B. L. R., Ap., 1*) to transfer the proceedings to be tried by another officer appointed or deputed by the Government of Bengal to try the case. ABDOOL KADIR KHAN *v.* MAGISTRATE OF PURNEAH [11 B. L. R., Ap., 8 ; 20 W. R., Cr., 23

26. ———— **Judicial officers interested in case.**—*Criminal Procedure Code, 1872, s. 64.—Road Cess case.—Transfer of appeal for trial.*—

TRANSFER OF CRIMINAL CASE—*continued.*

3. GROUND FOR TRANSFER—*continued.*

Judicial officers interested in case—*continued.*

Where it appeared that the only officers in the district of P. otherwise competent to hear an appeal from a conviction for theft of property alleged to have belonged to the Road Cess Committee of the district were, by reason of their connection with that committee, interested in the result of the appeal, the High Court directed that the petition of appeal, together with all papers connected therewith, should be forwarded to the Sessions Judge of the 24-Pergunnahs, to be dealt with as an appeal presented in his own Court. IN THE MATTER OF DWARKA NATH BANERJEE . . . . 6 C. L. R., 279

27. ———— **Magistrate expressing opinion unfavourable to accused.**—*Criminal Procedure Code, 1861, s. 36.—Transfer by Magistrate.*—Although section 36 of the Code of Criminal Procedure did not require a Magistrate to state his reasons for transferring a criminal case from a Court subordinate to him to his own or to any other subordinate Court, the High Court set aside an order of a Magistrate transferring a case after the Subordinate Magistrate, before whom it was, had taken the evidence for the prosecution, and had expressed an opinion unfavourable to the prosecution. QUEEN *v.* NOBOCOOMAR BANERJEE . 14 W. R., Cr., 12

28. ———— **Jurisdiction.**—*Place of commission of offence.—Transfer of preliminary investigation.—Criminal Procedure Code, 1872, ss. 64 and 69.*—The High Court, under sections 64 and 69 of the Code of Criminal Procedure, directed the preliminary investigation in this case, in which the accused was charged with criminal breach of trust, to be held in Calcutta, the place where the offence charged was, if not wholly, at all events partly, committed. QUEEN *v.* MACDONALD . . . . 22 W. R., Cr., 6

TRANSFER OF PROPERTY.

See VENDOR AND PURCHASER—COMPLETION OF TRANSFER.

[I. L. R., 2 Bom., 547
I. L. R., 5 Bom., 554

———— **Erection of building for school on land.**—*Gift of building for a school.—Position of managers of school.—Suit by managers for trover and trespass.*—Where a party who, partly with his own funds and partly with R100 subscribed by the village, erected a building for a school, never gave the property to the school, and never even acquiesced in the managers of the school entering upon it,—*Held* that the managers entered upon it as trespassers, and that although the proprietor acquiesced in their having taken possession, he did not thereby convey any property in the school to the subscribers, and was not bound to repay that portion of the money which he expended himself in building the house, or to do more than return that portion of the funds which were subscribed by the village. SREEHURRY ROY *v.* HILLS . . . 7 W. R., 476

TRANSFER OF PROPERTY—*continued.*

Erection of building for school on land—*continued.*

S. C. on reference on original trial [6 W. R., Civ. Ref., 21

——— while transferor is out of possession.

See VENDOR AND PURCHASER—BILLS OF SALE . . 2 B. L. R., P. C., 111

1. ——— Sale while vendor is out of possession.—*Right of purchaser to sue for possession.*—It is the practice of the Courts in this country to give effect to sales of property made by persons out of possession, and to recognise the title of the purchaser to maintain a suit. RUNNOO PANDEY *v.* BUKSH ALI . . . 3 N. W., 2

KUMUROODDEEN *v.* BHADOO . 11 W. R., 134

AULOCK MONEE DOSSIA *v.* AULOCK MONEE DEBIA . . . . . 25 W. R., 48

PRANKRISHNA DEY *v.* BISWAMBHAR SEIN [2 B. L. R., A. C., 207 11 W. R., 81

2. ——— *Right of purchaser to sue for possession.—Want of consideration.*—Alleged purchasers whose vendors were not in possession, and who have paid nothing for what is said to have been sold to them, are not competent to maintain a suit for possession of the property in dispute. BISHONATH DEY ROY *v.* CHUNDER MOHUN DUTT BISWAS . . . . . 23 W. R., 165

See TARA SOONDOREE CHOWDHRAIN *v.* COLLECTOR OF MYMENSINGH [13 B. L. R., 495: 20 W. R., 446

3. ——— *Right of purchaser to sue for possession.*—The current of High Court decisions on the question whether a purchaser from a party not in possession is competent to maintain a suit to recover the land, is in favour of the right to bring a suit. BISSESSUR DOSS *v.* JOYKISHORE DOSS . . . . . 25 W. R., 223

4. ——— *Wrongful dispossession of vendor.—Right of vendee to sue for possession.*—Where a conveyance of property was made by a person who had been in possession and enjoyment for years before she was wrongfully ousted, the conveyance was held to give a right to sue for immediate possession. BIKAN SINGH *v.* PARBUTTY KOOER [22 W. R., 99

NITTYANUND GOSSAIN *v.* SHAMA CHURN CHATTERJEE . . . . . 23 W. R., 163

See GUNGA HURRY NUNDEE *v.* RAGHUBRAM NUNDEE . 14 B. L. R., 307: 23 W. R., 131

5. ——— *Right of assignee to sue for possession.—Third parties.—Requisite proof.*—An assignee of property, of which the assignor was not in possession when the assignment was made, can only recover, even from the hands of third persons, upon showing that he would have a right to enforce specific performance of his contract against his assignor if the property were come back to the hands of the assignor. BOODHUN SINGH *v.* LUTEEFUN . . . . . 22 W. R., 535

TRANSFER OF PROPERTY—*continued.*

Sale while vendor is out of possession—*continued.*

6. ——— *Right to specific performance after purchase of right to sue.*—Where a purchaser of a right to sue for possession brings a suit for specific performance, and it is not shown that he has left undone anything necessary to entitle him to what he claims, it must be taken in special appeal that the plaintiff is entitled to insist on specific performance of his contract with his vendor. LALLA SABIL CHAND *v.* GOODUR KHAN [22 W. R., 187

7. ——— *Suit by assignee for possession.—Effect of bill of sale.*—The assignees, *R.*, *K.*, and *G.*, of certain property brought against the assignor, *L.*, and others, a suit to obtain possession of a portion of assigned property of which he, *L.*, never had possession, and to obtain a declaration of right of ownership to the other portion already in the possession of one or more of themselves. *Held* that as *L.*, at the time when the assignments were made, was not in either actual or constructive possession, he was unable thereby to pass the property, and that the bill of sale was only evidence of a contract to be performed in future upon the happening of a contingency. RAM KHELAWUN SINGH *v.* OUDH KOOER . . . . . 21 W. R., 101

And *see* BOODHUN *v.* BOODHUN SINGH [21 W. R., 156

8. ——— *Suit by assignee for possession.—Validity of transfer.*—The plaintiffs sought to recover possession from the defendants of certain land, claiming under a kararnama executed to them by one Mutyawa. The defendants contended that Mutyawa had never been in possession of the land. The lower Appellate Court held that as Mutyawa was not in possession at the time when the kararnama was executed, the plaintiff's claim was not maintainable. On appeal to the High Court,—*Held*, reversing the decree of the lower Appellate Court, that the circumstance of Mutyawa's not having been in possession at the time the kararnama was executed did not prevent the plaintiffs from recovering possession from the defendants. *Kalidas* v. *Kanhaya Lall, I. L. R., 11 Calc., 121: L. R., 11 I. A., 219*, referred to and followed. UGARCHAND MANACKCHAND *v.* MADAPA SOMANA [I. L. R., 9 Bom., 324

9. ——— *Sale in execution of decree.—Assignment by purchaser who has not obtained possession.*—Upon a sale in execution of a decree the property in the thing sold passes to the purchaser; and there is nothing in either the Hindu or the English law which debars a third person from taking an assignment of such property from the auction-purchaser, albeit it has not been reduced into possession by him. GOVIND RAGUNATH *v.* GOVIND JAGOJI . . . I. L. R., 1 Bom., 500

TRANSFER OF PROPERTY—*continued.*

10. ——— **Hypothecation of property without possession.**—*Incomplete title.*—*Held* that the hypothecation of property to which a judgment-debtor had not acquired absolute title was incomplete and insufficient to create a valid and perfect lien in favour of the mortgagee enforceable by law against the actual possessor. HERCHUND SINGH *v.* RAM SINGH . . . . **1 Agra, 286**

11. ——— **Lease granted while lessor is out of possession.**—A valid lease cannot be granted by a person not in possession of the lands leased. TIERY *v.* KRISTO MOHUN BOSE. HOVENDEN *v.* AKBAR ALI . . **L. R., 1 I. A., 76**

12. ——— *Rights of lessee.*—*Suit for possession.*—A transfer of property of which the transferor is not at the time of the transfer in possession, is not *ipso facto* void. Where a putnidar, while out of possession of the putni estate, granted a dur-putni thereof,—*Held* that the dur-putnidar's suit against third persons, who were in possession of the estate, to recover possession, would lie, it appearing that the plaintiff had paid an adequate consideration for the dur-putni, and that the dur-putni pottah was not evidence of a contract to be performed in future on the happening of a certain contingency, or that if it were so, that the plaintiff had done all he was bound to do to entitle him to specific performance of the agreement by the putnidar. LOKENATH GHOSE *v.* JUGOBUNDHOO ROY **[I. L. R., 1 Calc., 297**

TRANSFER OF PROPERTY ACT (IV OF 1882).

See LEASE—CONSTRUCTION. **[I. L. R., 7 Bom., 256**

See MORTGAGE — FORECLOSURE—DEMAND AND NOTICE OF FORECLOSURE. **[I. L. R., 8 All., 388**

——— **s. 2.**

See s. 10 . . **I. L. R., 7 All., 516**

1. ——— *Mortgage executed before Act came into force.*—*Assignment of after Act in operation.*—The provisions of the Transfer of Property Act apply to the assignment of a mortgage made after that Act came into force, although the mortgage may have been made before the commencement of that Act. LALA JUGDEO SAHAI *v.* BRIJ BEHARI LAL . . **I. L. R., 12 Calc., 505**

2. ——— **and ss. 67, 86.**—*Suit for foreclosure of mortgage.*—*Beng. Reg. XVII of 1806, ss. 7, 8.*—*Procedure.*—*Act I of 1868 (General Clauses Act), s. 5.*—A mortgagee by conditional sale, under an instrument executed while Regulation XVII of 1806 was in force, and before the Transfer of Property Act, 1882, which repealed that Regulation, came into force, sued, after the repeal of that Regulation, for foreclosure of the mortgage, not having proceeded in accordance with the provisions of section 8 of that Regulation. *Held* (STUART, *C. J.*, dissenting) that the procedure of that section

TRANSFER OF PROPERTY ACT (IV OF 1882), s. 2, and ss. 67, 28—*continued.*

was not saved by clause (*c*) of section 2 of the Transfer of Property Act, but the provisions of that Act were applicable to the suit. GANGA SAHAI *v.* KISHEN SAHAI . . . **I. L. R., 6 All., 262**

3. ——— **and ss. 67, 99.**—*Mortgage-decree.*—*Execution of decree.*—A decree-holder, who had obtained a decree in the year 1880 against his judgment-debtor, declaring his title in certain mortgaged properties and authorising a sale, sought, after several previous applications keeping the decree alive, to execute his decree again on the 15th April 1885. The judgment-debtor objected, on the ground that no suit had been instituted or decree obtained under section 67 of the Transfer of Property Act as directed by section 99. *Held* that section 99 of that Act was not intended to apply to decrees already obtained declaring a lien and authorising a sale, but even assuming that it was so intended, section 2 of the Act saved the right of the decree-holder to obtain a sale of the mortgaged properties. *Ganga Sahai v. Kishen Sahai, I. L. R., 6 All., 262*, distinguished. DINENDRA NATH SANNYAL *v.* CHANDRA KISHORE MUNSHI **[I. L. R., 12 Calc., 436**

4. ——— **cl. (c), and s. 86.**—*Mortgage.*—*Conditional sale.*—*Suit for possession on foreclosure.*—*Beng. Reg. XVII of 1806, ss. 7, 8.*—The procedure laid down in the Transfer of Property Act may be applied to the case of foreclosure of a mortgage executed before the Act came into operation, provided it be so applied as not to affect the rights saved by section 2, clause (*c*) of the Act. Where, therefore, under the provisions of Regulation XVII of 1806, notice of foreclosure had been served on a mortgagor by conditional sale, the mortgage having been executed and the foreclosure proceedings taken before the Transfer of Property Act came into force, and after the expiry of the year of grace the money not having been paid, the mortgagee instituted a suit for possession on foreclosure, and when such suit was defended by a third party who had purchased the mortgaged property at an execution sale and obtained possession before the commencement of the foreclosure proceedings, and the necessary notice had not been served upon him,—*Held* that it was competent to the Court to apply the procedure prescribed by the Transfer of Property Act and grant the mortgagee a decree in the terms of section 86, substituting the period of "one year" for the period of "six months" therein mentioned. *Ganga Sahai v. Kishen Sahai, I. L. R., 6 All., 622*, referred to. PERGASH KOER *v.* MAHABIR PERSHAD NARAIN SINGH . . **I. L. R., 11 Calc., 582**

5. ——— *Mortgage.*—*Foreclosure, Suit for.*—*Mortgage by conditional sale.*—*Beng. Reg. XVII of 1806.*—*Procedure.*—*Statute, Construction of.*—Where a suit is brought, after the date of the Transfer of Property Act, for the foreclosure of a mortgage dated previous to the Act, the procedure to be followed is that given by the Transfer of Property Act; the procedure of Regulation XVII, 1806, not being saved by section 2 (clause *c*)

TRANSFER OF PROPERTY ACT (IV OF 1882), s. 2, cl. (c), and s. 86—*continued.*

of Act IV, 1882. *Ganga Sahai* v. *Kishen Sahqi, I. L. R., 6 All., 262,* approved. *Per* WILSON, *J.*—It is a general rule in construing statutes that in matters of substantive right they are not to be so read as to take away vested rights; but that in matters of procedure they are general in their operation. There is nothing in the Transfer of Property Act from which it can be beyond reasonable doubt concluded that the Legislature intended to depart from this settled principle of legislation. *Per* TREVELYAN, *J.*—There is a clear distinction between "relief" and the mode or procedure for obtaining such relief. The "relief" remains unaffected by a change of procedure. The "rights and liabilities" of a mortgagor and mortgagee, and the "relief" in respect of such rights and liabilities, are the same under Act IV of 1882 as they were before. A different procedure for enforcing such rights and obtaining such relief has, however, been adopted by the Transfer of Property Act. BHOBO SUNDARI DEBI *v.* RAKAL CHUNDER BOSE

[I. L. R., 12 Calc., 583

1. ——— s. 10.—*Married Woman's Property Act (III of 1874), s. 8.—Restraint on anticipation.*—Section 10 of the Transfer of Property Act merely excepts from the general rule laid down in section 8 of the Married Woman's Property Act, III of 1874, the particular case of a married woman, and does not give to a restraint upon anticipation any greater force than it had before the passing of the Act, but merely preserves to it the effect it had previously, leaving the Married Woman's Property Act of 1874 and the decisions upon it untouched. HIPPOLITE *v.* STUART . I. L. R., 12 Calc., 522

2. ——— and s. 2.—*Condition against alienation.—Inheritance.—Deed of compromise.—Beng. Civil Courts Act, VI of 1871, s. 24.*—In a suit for possession of certain shares in certain villages, a compromise was effected between the plaintiffs and *B.*, the defendant. The terms of the compromise were embodied in a deed, the terms of which were (*inter alia*) as follows: "The said *B.* will hold possession as a proprietor, generation by generation, without the power of transferring in any shape. The following shares recorded in *B.'s* name shall not be transferred or sold in auction in payment of any debt payable by the said *B.*, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside that transfer, and to obtain possession." *B.* obtained possession of the shares allotted to him by the compromise. Subsequently, certain creditors of *B.* attached the shares referred to in the deed in execution of a decree obtained against the heirs of *B.* for money lent to *B.* on a bond, which he had executed while in possession of the shares, and in which he made a simple mortgage of them. The representatives of the plaintiffs in the suit in which the compromise was made objected to the attachment. *Held* by OLDFIELD, *J.*, that the deed of compromise passed an absolute estate to *B.* and his heirs to which the law annexed a power of transfer, and that, in reference to section 10 of the Transfer of Property Act, the stipulation against alienation on *B.'s* part, or against sale by auction in execution of decrees against him, was void. *Per* MAHMOOD, *J.*—That the rule contained in section 10 of the Transfer of Property Act was not binding upon the Court in this case, inasmuch as the question was one of succession or inheritance, to be governed by section 24 of the Bengal Civil Courts Act; that it was for those objecting to the attachment to show that, under the Hindu law, the rights of *B.* in the property ceased to exist at his death, or that his estate devolved upon them free of his debts; that, the Hindu law being silent on this subject, the principles of justice, equity, and good conscience must be applied, to which, so far as transfer was concerned, effect was given by section 10 of the Transfer of Property Act; that the restriction imposed by the deed of compromise upon *B.'s* powers of alienating the absolute estate which it conferred upon him were opposed to the policy of the law and could not be recognised; and that *B.* must be held to have had an absolute estate which would devolve upon his heirs, and which could be sold in execution of decrees for his debts. The *Tagore Case, 9 B. L. R., 377,* referred to. BHAIRO *v.* PARMESHRI DAYAL . . I. L. R., 7 All., 516

TRANSFER OF PROPERTY ACT (IV OF 1882), s. 10 and s. 2—*continued.*

——— ss. 10, 11.

See RIGHT OF SUIT — CONTRACTS OR AGREEMENTS . I. L. R., 8 All., 452

——— ss. 41, 43.

See N.-W. P. RENT ACT, s. 7.

[I. L. R., 8 All., 409

——— s. 51.

See DECREE—FORM OF DECREE—MORTGAGE . . I. L. R., 8 All., 502

——— s. 52.

See s. 135 . I. L. R., 13 Calc., 297

——— *Registered and unregistered documents.—Transfer of property "pendente lite."—Act III of 1877 (Registration Act), s. 50.*—*B.* held a decree for the sale of property which had been mortgaged to him by an instrument which was not compulsorily registrable and was not registered. *N.* purchased the same property *pendente lite* by a registered deed of sale. *Held* that there was here no competition between a registered and an unregistered instrument to which section 50 of the Registration Act could apply; and that *N.'s* purchase was, by section 52 of the Transfer of Property Act, subject to the decree passed in *B.'s* favour. BHAGWAN DAS *v.* NATHU SINGH . I. L. R., 6 All., 444

——— s. 53.

See REGISTRATION ACT, 1877, s. 50.

[I. L. R., 8 All., 540

——— s. 54.

See PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-URZ.

[I. L. R., 7 All., 482, 626

TRANSFER OF PROPERTY ACT (IV OF 1882), s. 54—*continued.*

——— *Optional registration.—Per* GARTH, *C. J.*—Section 54 of the Transfer of Property Act virtually abolishes optional registration. NARAIN CHUNDER CHUCKERBUTTY *v.* DATARAM ROY . I. L. R., 8 Calc., 597: 10 C. L. R., 241

——— s. 58.

See PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-URZ.
[I. L. R., 7 All., 258, 343

——— s. 59.

See COMPROMISE—COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE.
[I. L. R., 9 Mad., 103

——— s. 62.

See MORTGAGE—REDEMPTION—MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE . I. L. R., 8 All., 402

——— s. 65.

See LANDLORD AND TENANT—TRANSFER BY TENANT . I. L. R., 10 Calc., 443

——— s. 67.

See s. 2 . . I. L. R., 6 All., 262
[I. L. R., 12 Calc., 436

——— s. 68.

See MORTGAGE—POSSESSION UNDER MORTGAGE . . I. L. R., 6 All., 298

——— s. 76.

See LANDLORD AND TENANT—TRANSFER BY TENANT . I. L. R., 10 Calc., 443

See MORTGAGE—ACCOUNTS.
[I. L. R., 6 All., 303

——— s. 84.

See MORTGAGE—REDEMPTION—MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE . I. L. R., 8 All., 502

——— s. 86.

See s. 2.
[I. L. R., 12 Calc., 436, 505, 583
I. L. R., 11 Calc., 582
I. L. R., 6 All., 262

See LIMITATION ACT, 1877, ART. 135.
[I. L. R., 12 Calc., 614

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY—GENERAL CASES . I. L. R., 13 Calc., 346

——— s. 87.

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY—GENERAL CASES . I. L. R., 13 Calc., 346

——— s. 88.

See EXECUTION OF DECREE—MODE OF EXECUTION—MORTGAGE.
[I. L. R., 7 All., 194

TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued.*

——— s. 95.

See LIMITATION ACT, 1877, ART. 148.
[I. L. R., 8 All., 295

——— s. 99.

See s. 2 . . I. L. R., 12 Calc., 436

——— s. 100.

See LIMITATION ACT, 1877, ART. 148.
[I. L. R., 8 All., 295

——— ss. 106, 111.

See LANDLORD AND TENANT—EJECTMENT—NOTICE TO QUIT.
[I. L. R., 7 All., 596, 899

——— s. 118.

See PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-URZ . I. L. R., 7 All., 626

——— s. 123.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—ANNUITY OR PENSION.
[I. L. R., 6 All., 634

1. ——— s. 131.—*Transfer of debts.—Notice of transfer.—Assignment of mortgage.—Mortgagor, Liability of, to assignee of mortgagee when no notice of assignment given.*—An assignment is perfectly valid though the notice referred to in section 131 of the Transfer of Property Act has not been given, though the title of the assignee as against third parties is not complete until such notice has been given; the object of such notice being the protection of the assignee. Section 131 of the Transfer of Property Act makes no alteration in the law as it obtained in England previous to the passing of that Act and as laid down in the cases cited in the note to *Ryall* v. *Rowles, 2 W. & T. L. C., 777,* the first portion of the section merely fixing the time when the section comes into operation, and the latter providing for the protection of the debtor if he deals with the debt before that time. Where, therefore, an assignee of a mortgagee brought a suit on the mortgage against the mortgagor and the mortgagee, and no notice of the assignment had been given to the mortgagor under section 131 of the Transfer of Property Act,—*Held* that the Court was wrong in dismissing the suit merely on the ground that no notice was served, as after the suit was instituted the mortgagor became aware of the assignment, and the transfer accordingly came into operation on the date when he thus became aware of it. LALA JUGDEO SAHAI *v.* BRIJ BEHARI LAL . . . . I. L. R., 12 Calc., 505

2. ——— *Decree.—Debt.*—A decree is not a "debt" within the meaning of that word as used in section 131 of the Transfer of Property Act. A "debt" under that section means an actionable claim, and not a claim which has already passed into a decree. AFZAL *v.* RAM KUMAR BHUDRA
[I. L. R., 12 Calc., 610

1. ——— s. 135.—*Transferee of a claim for smaller value.—Recovery of full amount of debt.*—It

TRANSFER OF PROPERTY ACT (IV OF 1882), s. 135—*continued.*

is not the object of section 135 of the Transfer of Property Act absolutely to prevent a transferee, who has purchased a claim at a smaller value, from recovering the full amount of the debt due from the debtor. GRISH CHANDRA *v.* KASHISAURI DEBP [I. L. R., 13 Calc., 145

2. ——— *Right of Suit.—Suit to set aside a document.—Actionable claim.*—The co-sharers of a Hindu family, one of whom was a minor, owned certain immoveable property in Munshigunge near Dacca. In 1873 a perpetual lease of this property, executed by all the co-sharers except the minor, was granted to certain persons hereinafter called the lessees. On the minor's behalf the lease was executed by his elder brother as guardian of the minor. In May 1882, the minor, who had previously attained his majority, sued the lessees and his co-sharers for a declaration of his right to and for possession of his share in the said property, alleging that the perpetual lease was not binding on him. On the day after the institution of the suit the plaintiff sold all his interest therein to *A.* for R600. *Held* that *A.'s* purchase was an actionable claim within the meaning of section 135 of the Transfer of Property Act. RAJANIKANTH NAG RAI CHOWDHURI *v.* HARI MOHAN GUHA [I. L. R., 12 Calc., 470

3. ——— and s. 52.—*Sale of immoveable property by person out of possession.—Actionable claim.*—A transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession. *A.* and *B.* being owners of an 8 annas share of certain immoveable property sold it under a kobala to *C.* and *D.* At the time of the sale *X.* and *Y.* were in adverse possession of the share. *Held* that the transaction was a sale under section 52 of the Transfer of Property Act, to which the provisions of Chapter VIII of the Act, specially those of section 135, were inapplicable. *Semble,*—Section 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property. MUDUN MOHUN DUT *v.* FUTTARUNNISSA [I. L. R., 13 Calc., 297

TRANSFER OF SHARES, REGISTRATION OF—

See BANK OF BENGAL. [I. L. R., 3 Calc., 392

TRANSFER OF TENURE.

See BENGAL REGULATION VIII OF 1819. [3 B. L. R., P. C., 48

See CASES UNDER LANDLORD AND TENANT—TRANSFER BY LANDLORD.

See CASES UNDER LANDLORD AND TENANT—TRANSFER BY TENANT.

See CASES UNDER RIGHT OF OCCUPANCY—TRANSFER OF RIGHT.

See STAMP ACT, 1862, s. 14. [3 B. L. R., Ap., 30

TRANSFER OF TENURE—*continued.*

1. ——— Grant for purpose of living on the land.—*Per* PEACOCK, *C. J.*—If one man grants a tenure to another for the purpose of living upon the land, that tenure, in the absence of evidence to the contrary, is assignable. BENI MADHUB BANERJEE *v.* JAI KRISHNA MOOKERJEE [7 B. L. R., 152 : 12 W. R., 495

Upholding, on appeal, KEMP, *J.*, in BANEE MADHUB BANERJEE *v.* JOY KISHEN MOOKERJEE [11 W. R., 354

2. ——— Mokurrari tenure.—It is necessary that a tenure should be mokurrari in order to be transferable. HUROMOHUN MOOKERJEE *v.* LALUNMONEE DASSEE . . . . . 1 W. R., 5

3. ——— Surburakari tenure in Cuttack.—*Consent of zemindar.*—The alienation of surburakari tenure in Cuttack is not practicable without the consent of the zemindar. DOORJODHUN DOSS *v.* CHOOYA DAYE. . . 1 W. R., 322

4. ——— Ryotwari tenure.—*Consent of zemindar or talookdar.—Quære,*—Whether a transfer of a ryotwari tenure can be effected without the consent of the zemindar or talookdar, as the case might be, the immediate successor in estate. SHIBESSUREE DEBIA *v.* MOTHOORANATH ACHARJEE [13 W. R., P. C., 18 : 16 Moore's I. A., 270

TRANSFER, REGISTRATION OF—

See BENGAL RENT ACT, 1869, s. 46. [1 B. L. R., S. N., 7
10 W. R., 101
8 W. R., 138

See CASES UNDER LANDLORD AND TENANT—ACKNOWLEDGMENT OF TENANCY, &c.

See CASES UNDER LANDLORD AND TENANT—TRANSFER BY TENANT.

See SALE FOR ARREARS OF RENT—DEPOSIT TO STAY SALE . 13 B. L. R., 146

See SALE FOR ARREARS OF RENT—EFFECT OF SALE . . . 9 W. R., 161
[7 W. R., 409
Marsh., 212
1 W. R., 225

TRANSFERABLE TENURE.

See ACQUIESCENCE . 7 B. L. R., 152
[10 B. L. R., Ap., 5

See CASES UNDER LANDLORD AND TENANT—TRANSFER BY TENANT.

See PATNI TENURE. [3 B. L. R., A. C., 437

See CASES UNDER RIGHT OF OCCUPANCY—TRANSFER OF RIGHT.

TRANS-SHIPMENT PERMIT.

See SEA CUSTOMS ACT, s. 128. [I. L. R., 4 Bom., 447

TRANSPORTATION.

See SENTENCE—TRANSPORTATION.

——— Absence by reason of—

See LIMITATION ACT, 1877, s. 7.
[1 B. L. R., S. N., 25

TREASON.

See WAGING WAR AGAINST THE QUEEN.
[7 B. L. R., 63

TREASURE TROVE.

1. ——— Beng. Reg. V of 1817.—*Hidden treasure.—Duty of finder of hidden treasure.—Rights of finder, zemindar, and Government.*—Some persons while digging a field in a certain zemindari found an earthen pot containing money. The finder and the zemindar both claimed to be entitled to the treasure, but the provisions of Regulation V of 1817, with regard to the finding of hidden treasure, were not complied with by them, and on this ground the Judge held they were not entitled to it. The Government claimed the money on the ground that the provisions of the Regulation had not been complied with, and it was made over to the Collector, an appeal to the High Court being dismissed. IN RE UMA CHARAN BANERJEE . 7 B. L. R., Ap., 3

S. C. OMA CHURN BANERJEE *v.* COLLECTOR OF HOOGHLY . . . . 15 W. R., 525

2. ——— s. 6 and s. 2.—*Valuable property.—Ornament.*—The owner of the house where an ornament has been found concealed may, under section 6, Regulation V of 1817, retain possession of it as a "valuable property" under section 2, if no one else has substantiated any claim thereto. PREM MOYEE BEWAH *v.* NOBIN CHUNDER CHOWDHRY
[4 W. R., Mis., 8

3. ——— Mad. Reg. XI of 1832.—*Right to idols discovered.—Right of owner of property.—Right of trespasser.—Omission to give notice to authorities.*—Certain idols and vessels of copper were discovered accidentally by one Shaik Mira and his brother, while digging for stones, in a masonry building underneath the ground in a rather elevated part of the bed of the tank of Anandur which belongs to the zemindari of Shivaganga. No intimation of the discovery was given by the finders to any public authority, but the Subordinate Magistrate, being informed of it by the police, proceeded to the spot and recovered the idols on the third or fourth day after they were found. They were then sent by the Magistracy to the Court of the Principal Sudder Ameen of Madura to be dealt with under the provisions of Regulation XI of 1832. Proclamation inviting claimants was made and petitions asking for possession of the idols were presented by three parties—1st, by the Rani of Shivaganga, on the ground that she was trustee of the Devastanams on her estate, on which the idols had been found; 2nd, by the Stanikam of a temple in the village of Anandur; and 3rd, by the finder. The Principal Sudder Ameen adjudged the idols to be the property of the Rani, and directed that they should be delivered to her. The finder appealed to the Civil Court, which reversed the decision of the Principal Sudder Ameen and directed delivery to the appellant. Against this order the Rani appealed to the High Court on the grounds—1st, that Regulation XI of 1832 only applies to cases in which the ownership of the property is undiscovered, and that, in the present case, the Rani was presumably the owner of the property found; 2nd, that a trespasser could not benefit by the finding. *Held* that the Rani had no title to what had been hidden in former times in the soil now belonging to her: that it had been found that these idols were hidden in a stone chamber specially appropriated to that purpose, and that she could not, therefore, claim a title as owner. As to the objection that the finder, being a trespasser, could not benefit,—*Held* that it was unnecessary to consider this objection unless the Rani had some right or title to the treasure, the same as she had in the soil of the tank: that she had not such right, and therefore that the contention as to the right to the property found lay between the finder and the State, which had made no claim. An objection, not before taken, was allowed to be argued at the hearing, —*viz.*, that the formalities prescribed by the Regulation had not been complied with. *Held* that, though immediate notice had not been given by the finder, the property was within three or four days of its discovery in the hands of the authorities, who might be said, therefore, to have supplied the necessary notice. KATTAMA NATCHIAR (ZEMINDARNI OF SHIVAGANGA) *v.* MUHAMMAD MIRA RAVUTAN
[7 Mad., 150

TREATIES.

1. ——— Tenure of territory in Bombay.—The nature and results of Governor Aungier's Convention stated, and the origin of "pension and tax" in Bombay traced. Treaty of the 23rd June 1661 between Charles II. and the King of Portugal considered. The treaty in 1664-65 by Mr. Humphry Cook with the Viceroy of Goa was entered into without authorisation by the Crown of England or the Crown of Portugal, was not ratified by either, was expressly repudiated by the former, and never was of any force. *Doe d. de Silveira* v. *Texeira, 2 Mor. Dig., 250,* observed upon. NAOROJI BERAMJI *v.* ROGERS . . . . 4 Bom., O. C., 1

2. ——— Cession of Bombay and Salsette to Portuguese.—The treaty made between Sultan Bahadur of Gujarat and the King of Portugal on the cession of Bassein and its dependencies (including Bombay and Salsette) to the Portuguese referred to. SECRETARY OF STATE IN COUNCIL *v.* BOMBAY LANDING AND SHIPPING COMPANY
[5 Bom., O. C., 23

See LOPES *v.* LOPES . 5 Bom., O. C., 172

TREES.

See CASES UNDER LANDLORD AND TENANT—PROPERTY IN TREES PLANTED ON LAND.

See LIMITATION ACT, 1877, s. 28 (1871, s. 29) . . I. L. R., 3 All., 435

TREES—*continued.*

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—MOVEABLE PROPERTY.
[I. L. R., 5 All., 564
24 W. R., 394
3 Mad., 237
I. L. R., 3 All., 168

TRESPASS.

Col.
1. GENERAL CASES 6043
2. HOUSE-TRESPASS 6045

See CIVIL PROCEDURE CODE, 1882, s. 244—QUESTIONS IN EXECUTION OF DECREE.
[3 B. L. R., A. C., 413
12 B. L. R., 208, note

See CASES UNDER CRIMINAL TRESPASS.

See DAMAGES—SUITS FOR DAMAGES—TORTS . . 8 Bom., A. C., 177
[7 N. W., 47
25 W. R., 548

See DEBTOR AND CREDITOR.
[2 Ind. Jur., O. S., 7

See EXECUTION OF DECREE—LIABILITY FOR WRONGFUL EXECUTION.
[3 B. L. R., A. C., 413
12 B. L. R., 208, note

See MASTER AND SERVANT.
[2 B. L. R., A. C., 227
2 B. L. R., O. C., 140

See RAILWAY ACT, 1871, s. 2.
[I. L. R., 1 Bom., 25

See RIOTING . . . I. L. R., 6 Mad., 245
[10 C. L. R., 278
W. R., 1864, Cr., 21

See WRONGFUL DISTRAINT.
[3 B. L. R., A. C., 261

——— by cattle.

See NUISANCE—UNDER CRIMINAL PROCEDURE CODES . 2 B. L. R., A. Cr., 45
9 B. L. R., Ap., 36

1. GENERAL CASES.

1. ——— Landlord and tenant.—*Damage to reversionary interests.—Right of landlord to sue for damage.—English law, Non-applicability of.*—Many of the tenures in India are in the nature of a partnership, in which he to whom the land belongs participates with the cultivators in the crop. Therefore the law of England, that a landlord who has parted with his possession to a tenant cannot sue in trespass for damage to the property, unless the wrongful act complained of imports a damage to the reversionary interests, does not apply to landlords in India. VENKATACHALAM CHETTI *v.* ANDIAPPAN AMBALAM . . . I. L. R., 2 Mad., 232

2. ——— Wrongful distraint of crops.—*Distraint without notice.—Penal Code, s. 79.—Resistance to wrongful distraint.*—A zemindar was held to be justified in exercising his right of private distraint of crops, if he had served the defaulters with written notices under Act X of 1859, section 116; and, in such a case, ryots, who knowingly resisted the distraint, were held to be not protected by the Penal Code, section 79. But, if the zemindar's people enter upon crops with intention of distraining without notice, the ryot-owners are justified in considering such action as trespass. QUEEN *v.* KANHAI SHAHU
[23 W. R., Cr., 40

TRESPASS—*continued.*

1. GENERAL CASES—*continued.*

Wrongful distraint of crops—*continued.*

3. ——— Land taken by Government without formality prescribed by Beng. Reg. I of 1825.—*Right of owner to maintain suit against Government for rent.*—Lands were occupied by the Government for the purpose of making an embankment without the observance of the formality required by Regulation I of 1825. *Held* that the owner of the land was entitled to maintain a suit against Government for the rent of the land during the time he was kept out of possession. JOYNARAIN BOSE *v.* COLLECTOR OF 24-PERGUNNAHS
[Marsh., 56

COLLECTOR OF 24-PERGUNNAHS *v.* JOYNARAIN BOSE . . W. R., F. B., 18: 1 Hay, 122

4. ——— Suit to prevent trespass.—*Suit to close doors.—Cause of action.—Possibility of injury.*—No suit can lie to close doors opened by a person in his own wall, on the ground of a possibility of his committing trespass on the land of the plaintiff, or of his having actually committed such trespass. It will only lie when the opening of the doors is in itself such an irremediable injury that the plaintiff would not be sufficiently compensated by money damages. GIBBON *v.* ABDUR RAHMAN KHAN . . . . 3 B. L. R., A. C., 411

5. ——— Sale for arrears of rent.—*Sale under defective notice.—Reversal of sale for irregularity.*—*A.*, a zemindar, sold the right of *B.*, his putnidar, for arrears of rent under Regulation VIII of 1819. This sale was subsequently set aside at the suit of *B.* for irregularity. *A.* then sued *B.* for the arrears under Act X of 1859, and *B.* pleaded limitation. *Held* that *A.* was not guilty of a trespass in bringing the property to sale under a defective notice, and *A.* could not have sued for arrears pending the proceedings to set aside the sale. SWARNAMAYI *v.* SHASHI MUKHI BAEMANI
[2 B. L. R., P. C., 10

S. C. SURNOMOYEE *v.* SHOSHEE MOKHEE BURMONIA . . 12 Moore's I. A., 244
[11 W. R., P. C., 5

6. ——— Trespass on burial-ground.—*Penal Code, s. 297.—Trespass by co-owner.*—*A.*, *B.*, *C.*, and *D.* were co-owners of a plot of land in which they were accustomed to bury their dead. *A.* and *B.* opened a saw-pit close to the graves of *D.'s* relatives, but did not disturb any of the graves. *Held* that they were wrongly convicted under section 297 of the Penal Code. IN RE MUHAMMAD HAMIN KHAN
[I. L. R., 3 Mad., 178

TRESPASS—*continued.*

1. GENERAL CASES—*continued.*

7. ——— Liability for trespass by defendants not actually committing it.—*Committee under Act XX of 1863.—Held,* in a suit under Act XX of 1863, that where the evidence showed that certain acts of trespass by one of the defendants were for the benefit and on behalf of the members of the committee, and were afterwards adopted and taken advantage of by them when they had acquired a full knowledge of those acts, the defendants for whose benefit the acts were done were liable for the trespass. VENKATASA NAIKER *v.* SRINIVASSA CHARIYAR . . . . . **4 Mad., 410**

2. HOUSE-TRESPASS.

8. ——— Breaking open chest in house by inmate of house.—*Penal Code, s. 457.*—*T.,* being an inmate of his uncle's house, broke open a chest and took out property from it. He was convicted of an offence under section 457 of the Penal Code. *Held* that he could not properly be convicted under that section. QUEEN *v.* TASUDUK HOSSEIN . . . . . **6 N. W., 301**

9. ——— Breaking open door in execution of decree.—*Penal Code, s. 456.*—Where the accused persons, execution-creditors, in company with an authorised bailiff, broke open complainant's door before sunrise with intent to distrain his property for which they were convicted on a charge of lurking house-trespass by night or house-breaking by night,—*Held* that as they were not guilty of the offence of criminal trespass, there being no finding of any such intent as is required to constitute that offence, and that as criminal trespass is an essential ingredient of either of the offences with which they were charged, the conviction must be quashed. IN THE MATTER OF JOTHARAM DAVAY **[I. L. R., 2 Mad., 30**

10. ——— Cattle-yard.—*Building used for custody of property.—Penal Code, ss. 442, 457.*—The Court inclined to hold that a cattle-yard which was originally walled on four sides, and in one side of which, fallen out of repair, there was a gap stopped with a thorn, was a building used as a place for the custody of property, within the meaning of section 442 of the Penal Code. QUEEN *v.* DULLEE . . . . . **6 N. W., 307**

11. ——— Entry into house with forged warrant of arrest.—*Penal Code, s. 452.*—Where *A.* goes with a forged warrant of arrest into a house, and takes away one of the inmates against his will under the authority of such warrant, he is guilty of house-trespass, by putting such person in fear of wrongful restraint, under section 452 of the Penal Code. QUEEN *v.* NUNDMOHUN SIRKAR . . . . . **12 W. R., Cr., 33**

12. ——— Right of wife to enter husband's house.—*Wife excommunicated from caste.*—Excommunication from caste *per se* does not deprive a Hindu wife of her right of joint enjoyment of her husband's house so as to make her a trespasser

TRESPASS—*continued.*

2. HOUSE-TRESPASS—*continued.*

Right of wife to enter husband's house—*continued.*

if she enters the house to claim maintenance. QUEEN *v.* MARIMUTTU . . **I. L. R., 4 Mad., 243**

13. ——— Entering lock-up with intent to convey food to prisoner.—*Penal Code, s. 442.*—Where a person entered into a havalat with intent to convey or attempt to convey food to a prisoner under trial, such act on his part did not amount to house-trespass within the meaning of section 442 of the Penal Code. EMPRESS *v.* LALAI **[I. L. R., 2 All., 301**

TRESPASSER.

——— Suit by, to recover money paid.

See WRONGFUL POSSESSION.
[I. L. R., 4 Calc., 566

——— Suit for mesne profits against—

See MESNE PROFITS—MODE OF ASSESSMENT AND CALCULATION.
[I. L. R., 1 All., 518

TROVER.

——— Suit in—

See HUSBAND AND WIFE.
[I. L. R., 1 Calc., 285

1. ———Right of stoppage in transitu.—*Contract for goods free on board.—Insolvency.*—Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. In such circumstances, held by the Privy Council (reversing the decision of the Supreme Court at Bombay) that trover would not lie for the goods, for that on their delivery on board the vessel they were no longer in *transitu* so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as after their election to be paid by a bill the receipts of the mate were not essential to the transaction between the seller and purchaser. FRAMJEE COWASJEE *v.* THOMPSON **[3 Moore's I. A., 422**

2. ——— Conversion. — *Assignment of goods in certain warehouses on advances.—Seizure of goods.—Advance and assignment not simultaneous.—Incomplete assignment.*—A bill of sale and assignment of goods described as being in certain warehouses belonging to *A.* was given by him for the loan of a sum expressed to have been paid on the day of the date thereof. Upon an action of trover

TROVER.—Conversion—*continued.*

brought against the assignee of *A.*, who had seized the goods, it appeared in evidence that a portion only of the goods was in the warehouse specified at the date of the sale, and that no part of the loan was paid on that day, the same being discharged by instalments a few days afterwards: whereupon the Judges of the Supreme Court held that there had been no valid transfer, and consequently no conversion, and gave an interlocutory judgment in accordance with such view. *Held* by the Judicial Committee on appeal from that decision, and from an order refusing a new trial, that the decision was not justified by the evidence, and must be reversed and a new trial granted. MUTTYLOLL SEAL *v.* O'DOWDA
[4 Moore's I. A., 382

3. ——— **Suit to recover notes lost by gambling.**—*Act XXI of 1848.—Illegal consideration.—Bonâ fide holder for value.—Trust for specific purpose.*—The plaintiff, the manager of the Oriental Bank, placed in the hands of *D.*, a broker, thirteen Government currency notes for R1,000 each on *D.'s* representation that there was some Company's paper at a certain place which he could procure at a more reasonable rate than in the Calcutta market, if the money were given him to purchase it. If the Company's paper was not procurable, the notes were to be returned to the plaintiff. *D.* did not go to the place stipulated to purchase the Company's paper, but, meeting the defendant and others, he went into a house hired for gambling, and lost at cards, and paid away to the defendant some of the notes he had received from the plaintiff. The plaintiff now sued the defendant to recover the notes so entrusted to *D.*, on the allegation that they had been entrusted by him to *D.* for a specific purpose, and that the defendant was not a *bonâ fide* holder for value. He (the plaintiff) stated in evidence "that if the paper had been bought, he would either have taken the papers at the most favourable market price for the bank, or have sold them and given *D.* the profit." *Held*, the plaintiff was entitled to recover. The defendant was not a *bonâ fide* holder for value. *Per* PAUL, *J.*, in the Court below, and *per* NORMAN, *J.*, on appeal.—The notes were especially entrusted to *D.* for the purchase of the Company's paper. *Per* PHEAR, *J.*—Upon the case put forward by the plaintiff, the transaction was a short loan, and not a bailment, and did not bear the character of a trust. But upon the evidence the notes were the property of the bank, and remained so in *D.'s* hands, and therefore the plaintiff was entitled to recover on behalf of the bank. BULDEO NARAIN *v.* SCRYMGEOUR
[6 B. L. R., 581

TRUST.

See ECCLESIASTICAL TRUST.
[2 Ind. Jur., O. S., 12

See ENGLISH LAW—TRUST, DECLARATION OF— . . . 4 Mad., 460

TRUST—*continued.*

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—SPECIAL CASES OF CONSTRUCTION—PERPETUITIES, TRUSTS, AND BEQUESTS TO A CLASS.
[2 B. L. R., O. C., 11
4 B. L. R., O. C., 103, 231

See CASES UNDER LIMITITION ACT, 1877, S. 10.

See LIMITATION ACT, 1877, ART. 113 (1871, ART. 113) . I. L. R., 2 Calc., 323

See WILL—CONSTRUCTION.
[I. L. R., 4 Calc., 420
I. L. R., 9 Mad., 325

——— **Constructive—**

See LIMITATION ACT, 1877, S. 10.
[I. L. R., 2 All., 361
I. L. R., 5 Mad., 91

——— **Disavowal of—**

See LIMITATION ACT, 1877, ART. 144 (1871, ART. 145)—ADVERSE POSSESSION.
[I. L. R., 1 All., 403

——— **Notice of—**

See LIMITATION ACT, 1877, ART. 134 (1871, ART. 134).
[I. L. R., 1 Bom., 269

——— **Revocation of—**

See ONUS PROBANDI—TRUST, REVOCATION OF— . . . 10 B. L. R., 19

——— **Right to account of administration of—**

See ACCOUNT, SUIT FOR—
[I. L. R., 1 Mad., 343

——— **For specific purpose.**

See LIMITATION ACT, 1877, S. 10 (1871, S. 10) . I. L. R., 4 Calc., 455, 897
[I. L. R., 6 Mad., 402

See TROVER . . 6 B. L. R., 581

1. ——— **Creation of trust.**—*Owner of property constituting himself trustee.—Father opening an account in name of his son.*—In order that the owner of a fund may constitute himself a trustee of it, he must either expressly declare himself a trustee, or must use language which, taken in connection with his acts, shows a clear intention on his part to divest himself of all beneficial interest in it, and to exercise dominion and control over it exclusively in the character of a trustee. From the single circumstance that an account has been opened by a father in his books in the name of his son, in which money is credited to the son, no presumption can be raised in India that the father intends to create a trust, in favour of his son, of the sums appearing in the account. ASHABAI *v.* TYEB HAJI RAHIMTULLA
[I. L. R., 9 Bom., 115

TRUST.—Creation of trust—*continued.*

2. ——————— *Subsequent disposition by settler.—Disposition out of income.—Held* that where a trust has been once perfectly created, although there may have been no transmutation of possession, it cannot be defeated by any subsequent act of the settlor, and apparent dispositions of portions of the property afterwards made by him to particular members of a family, the individuals constituting which have, as a class, a beneficial interest in the whole, must be regarded, not as gifts to them for creations of new trusts in their favour which he had no power to make, but as the acts of a trustee, and available only to the extent of the shares to which such persons may be entitled. But this applies only to dispositions out of the principal of the fund, and not to payments made out of its income to particular members of the family for their maintenance, or other expenses, as there may be circumstances which would render it inequitable to take an account of the latter, so as to charge such persons with what they may have received beyond their respective shares. JAMSETJI JIJIBHAI *v.* SONABAI . . . . **2 Bom., 130: 2nd Ed., 133**

3. ——————— *Invalid declaration of trust.—Intended transfer of property.—Incomplete gift.—Evidence of interested parties.*—The plaintiff, *H.*, was the daughter of one *K.*, deceased. *K.*, some two years before his death in 1866, contemplated conferring a bounty to the extent of ₹5,000 on each of his daughters, *M.* and *H.* For *M.* he bought a house at Zanzibar and settled it on her by a formal deed of settlement with various limitations. For *H.*, too, he at first intended to buy a house; but finding houses in Bombay were too dear, he purchased a Government promissory note of the nominal value of ₹5,000. The note was purchased in his own name, and a separate account of it opened in his books, headed "The account of one promissory note bearing 5 per cent. interest." This account he debited with all expenses over and above the ₹5,000 incurred in and about the purchase of the note, such as for premium, carriage hire, &c.,—charging, moreover, 9 per cent. interest on these items of debit (which interest he carried as a gain to his general interest account) and he credited the account with the interest collected on the note from time to time, allowing interest at 6 per cent. on these items of credit. He kept also a separate account of the proceeds of the note, headed "The account of interest on one promissory note for ₹5,000." The plaintiff stated that on the day when the note was bought her father *K.* brought it and showed it to her, saying, "This is your note; take it when you want it;" and that she left it in his custody, saying, "I will take the note when my sons grow up and do business." Corroborative evidence —which, however, differed in details from, and was in some respects inconsistent with, the evidence of the plaintiff—was given by the plaintiff's son and husband, as well as by a fourth witness not interested in the case. No interest was ever paid to the plaintiff by *K.* himself, although he lived for two years after the purchase of the note; but after *K.'s* death his son recognised some claim in the plaintiff

TRUST.—Creation of trust—*continued.*

to the income of the sum of ₹5,000 set apart by *K.*, and he paid her sums, equivalent to the proceeds of the note, with more or less regularity down to the date of his death. The note itself, however, he sold without communicating with the plaintiff, and appropriated to himself the sum realised by the sale, although he continued the account of interest on the note, and even headed that account in *H.'s* name. Later still, after the death of *K.'s* son, his grandsons, the defendants, made similar payments for some time, but irregularly, and finally they refused to pay anything further. The plaintiff sued for the note or its value, and for arrears of interest accrued due thereon, asserting that the evidence established a declaration of trust in respect of the note. *Held* that the evidence was insufficient to establish a valid declaration of trust, for while *K.'s* books of account might very well be held to corroborate the testimony of a trust which was itself of a satisfactory description, they were insufficient of themselves to establish such a trust; while the oral testimony—which, if taken together and accepted as reliable, might well suffice to establish the acknowledgment of a trust—contained such discrepancies and was so generally misty and uncertain in character that it ought not to be accepted unless corroborated by undisputed facts in the case incapable of being explained except on the hypothesis advanced by the plaintiff. *Per* SARGENT, *C. J.*—The equitable doctrine of the transfer of ownership by acknowledgment of trust, when it is sought to establish it by oral evidence, requires to be applied in this country with the greatest caution; and we cannot doubt that to allow an acknowledgment of trust to be established by the evidence of interested parties, speaking as to conversations which took place seventeen years ago without the corroboration derived from other evidence pointing irresistibly in the same direction, would be to introduce a most dangerous mode of appreciating evidence in this country, and would offer a direct encouragement to perjury. The suit dismissed, but without costs, *K.'s* intention that *H.* should have the benefit of the ₹5,000—to which, however, he had failed to give effect—being clear. HIRBAI *v.* JAN MAHOMED KHALAKDINA . **I. L. R., 7 Bom., 229**

4. ——————— *Gift.—Requisites to complete gift.—Donor constituting himself trustee for donee.—Enforcement of trust by representative of donee.—Trustee, Liability of.*—The plaintiffs *M.* and *R.* were Parsis, and were married in the year 1851. The defendant was the widow of *B. M.*, who was the father of the plaintiff *R.* The plaintiffs sued to recover from the defendant certain Government promissory notes which they alleged had been presented by *B.* to *M.* at her marriage for her sole and separate use. They alleged that the said notes, then of the nominal value of ₹1,500, were endorsed in the name of the said *B.*, and had been deposited by him for safe custody with *M.'s* grandfather *J.*; that the said *B.* during his life used from time to time to receive the said notes from *J.* and draw the interest thereon for *M.*; that *B.* died in 1864, and that after his death the defendant, who was his widow and executrix, used to draw the interest for *M.*; that in 1869 she obtained possession of the said notes, and had

TRUST.—Creation of trust—*continued.*

ever since continued in possession thereof, informing the plaintiffs that she was duly keeping them and collecting the interest for *M.*; that the plaintiffs had been living with the defendant until shortly before the present suit, and having then separated from her, had called upon her to hand over the notes and the accumulated interest, which she refused to do. The defendant denied that her husband *B.* had ever presented *M.* with Government notes for her separate use. She alleged that the notes which had been deposited by *B.* with *J.* were her own separate property, and not *M.'s*; that she and her husband had dealt from time to time with them, and that no interest was ever paid to the plaintiffs, or either of them, or for their benefit. She further stated that some of the notes which had been deposited with *J.* had been disposed of by *B.* in his lifetime with her consent; that in 1869 she obtained the remaining notes from *J.* and sold them, and applied the proceeds to her own benefit. At the hearing it was proved that, on the occasion of the plaintiff's marriage, presents were made to *M.* both by her own family and by that of the bridegroom *R.* Two accounts were then opened in the books of the firm of *J. N. & Co.*, of which *M.'s* grandfather *J.* was a partner, one of which showed her acquisitions from her own family, and the other her acquisitions from the family of her husband. The latter account contained an entry (under date August 1854) to the effect that *B.*, the father-in-law of *M.*, had bought two Government notes for R1,500 in *M.'s* name, and had obtained the interest on them, which was duly credited to her. Other documents were produced, proved to be in the handwriting of *B.* and *J.*, in which the said Government notes were alluded to as the property of *M.*, and as having been purchased with her moneys. In 1864 *B.* died without having endorsed the notes over to *M.* or to any one in her behalf, and they remained in his name in the hands of *J.* until 1869, when the defendant got possession of them. *Held* that *B.* was liable to answer for the notes as a trustee, and after *B.* the defendant as his executrix and representative. In the documents put in evidence, *B.* alluded to the notes as *M.'s* property. His placing them, as he did, with *M.'s* grandfather, was itself an acknowledgment, according to the practice of the class to which he belonged, that the benefit was to be hers and her children's. He thus sufficiently admitted an obligation as trustee. The legal ownership was his, but he had acknowledged with sufficient clearness an obligation to hold and use the ownership for the benefit of another. Such a purpose clearly manifested constitutes a trust, and burdened with a trust the property passed from *B.* to the defendant as his representative, and could be enforced against her. *Held*, further, that having regard to the general practice among Parsis, the conduct of *B.* in relation to the notes showed that it was his intention that the property should be enjoyed in sole and separate use by *M.* and her children. MERBAI *v.* PEROZEBAI

[I. L. R., 5 Bom., 268

5. ——— Suit for declaration of trust. —*Possession of trust property.—Breach of duty.*—In a suit for declaration of trust, with reference to

TRUST.—Suit for declaration of trust—*continued.*

lands, it must be shown that the party against whom the trust is prayed must have obtained a more or less rightful possession of the lands, but impressed with the obligation of a trust; that in a suit such as last mentioned, it must be shown that some duty *primâ facie* fell on the defendants, of which they were committing a breach. MUZHUR HOSSAIN *v.* DINOBUNDO SEN . . . **Bourke, O. C., 8: Cor., 94**

6. ——— Recognition of trust.—*Deed of gift, Validity of.—Oudh Estates Act (I of 1869), s. 8.*—A talookdar, deceased before annexation, had provided by will for the succession of his five widows, one at at a time, to his estate, with remainder to a son of his nephew. Settlement was made with the senior widow after the Mutiny, a sanad granted to her as talookdar, with full power of alienation, and her name was afterwards entered in the lists prepared under section 8 of the Oudh Estates Act, 1869. But certain of her acts were not explicable except on the understanding that she was abiding by the will. *Held*, in a suit by the widow next in order, that such senior widow had undertaken the trust of carrying out the provisions of the will, and that a deed of gift made by her transferred only her interest, which was an estate for life. RAMANUND KUAR *v.* RAGHUNATH KUAR. ANUNT BAHADUR SINGH *v.* RAGHUNATH KUAR

[I. L. R., 8 Calc., 769: 11 C. L. R., 149 L. R., 9 I. A., 41

7. ——— Cessation of trust.—*Cessation of performance by congregation of particular form of worship.—Commencement of different form of worship.*—If the congregation of a church as a body cease to follow the observances of a particular form of worship, and in preference for forty years follow those of a different form of worship, there would be no one left for whom and by whom the original form of worship can be continued, the objects of the original trust cease to exist, and the church funds and property become impressed with a trust for the performance of the later form of worship. MELLUS *v.* VICAR APOSTOLIC OF MALABAR

[I. L. R., 2 Mad., 295

8. ——— Suit to enforce trust.—*Suit for enforcing religious or charitable trusts.—Right of suit.—Pleading.—Security for costs.*—The representatives of a testator, who has created trusts for religious or charitable purposes, in which the representatives are not personally interested, may institute proceedings to have abuses in the trust rectified, there being no officer in this country who has such power of enforcing the due administration of religious or charitable trusts by information at the relation of some private individual, as is possessed by the Attorney General in England. A suit for this purpose should not be admitted unless the plaintiff gives sufficient security for costs. In order that a decree for an account may be made in favour of the plaintiff in such a suit, he must allege substantially in his plaint that which must be a distinct breach of trust;

TRUST.—Suit to enforce trust—*continued.*

it is not sufficient for him to make out a case of mere suspicion, or to rely on particular passages in the defendant's written statement. BROJOMOHUN DOSS *v.* HURROLOLL DOSS . **I. L. R., 5 Calc., 700**

9. ——— Transfer of property on trust.—*Transfer of property by convict sentenced to transportation.*—*B.* having been sentenced to transportation for life, presented a petition in the Revenue Court, in which, stating that he owned a certain zemindari estate, that he had been so sentenced, and that it was necessary to make arrangements for the payment of the Government revenue and the management of the estate, he prayed that his name might be removed from the revenue registers and that of *P.* be recorded in its stead. *Held* that the transfer of the property by *B.* to *P.* was in the nature of a trust. *Durga Prasad* v. *Asa Ram, I. L. R., 2 All., 361,* referred to. HAIT RAM *v.* DURGA PRASAD . . . . **I. L. R., 5 All., 609**

10. ——— Property held on trust.—*Assignment by trustees.*—*Limitation.*—In 1870 the purchasers and recorded proprietors of a four biswas share of a certain village caused a statement to be recorded in the village record of rights to the effect that *B.* claimed to be the proprietor of a moiety of such share, and that they were willing to admit his right whenever he paid them a moiety of the sum which they had paid in respect of the arrears of revenue due on such share. In 1843 *M.* purchased such share and became its recorded proprietor. In 1877 *K.*, the son of *B.*, sued the representative of *M.*, for possession of a moiety of such share, alleging, with reference to the statement recorded in the record of rights, that such moiety had vested in *M.'s* assignors in trust to surrender it to *B.* or his heirs on payment of a moiety of the sum they had paid on account of revenue, and paying into Court a moiety of such sum. *Held* that that statement could not be regarded as evidence of the alleged trust, and that, assuming that the alleged trust existed, the suit was barred by limitation, *M.* having purchased without notice of the trust and for valuable consideration. KAMAL SINGH *v.* BATUL FATIMA . . **I. L. R., 2 All., 460**

11. ——— *Holder of missing person's estate.*—*Possession.*—The possession by the widow or some other member of the family, of a missing person's estate may, in the absence of an indication of its being adverse, be considered to be that of a trustee until the expiry of the term fixed for his return. NARAIN SAHAI *v.* POSOO . **2 Agra, 78**

12. ——— *Absconding shareholder.*—*Custom for his share to be considered as held in trust for a certain time.*—*Failure to reclaim share.*—The plaintiffs sued to recover a share in a village on the allegation that it had been taken by the other shareholders of the village in trust for their father, according to custom, on his absconding from the village by reason of his inability to pay his quotum of Government revenue. The only evidence of the custom was a provision in a wajib-ul-urz that the share of a person who absconded should be held in

TRUST.—Property held on trust—*continued.*

trust for him for twelve years only. *Held* that, as the father of the plaintiffs did not reclaim his share within twelve years, the plaintiffs' right was forfeited. NAHANA *v.* DYA RAM . . **5 N. W., 170**

13. ——— *Wajib-ul-urz.*—*Absconding co-sharer.*—Where a clause of the wajib-ul-urz of a village stated in general terms that absconders from such village should receive back their property on their return, and certain persons who absconded from such village before such wazib-ul-urz was framed sued to enforce such clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to such wajib-ul-urz, alleging that their property had vested in such co-sharer in trust for them,—*Held* that before such co-sharer could be taken to have held their property as a trustee, there must be evidence that he accepted such trust, and this fact could not be taken as proved by the wajib-ul-arz. PIAREY LAL *v.* SALIGA **[I. L. R., 2 All., 394**

14. ——— *Wajib-ul-urz.*—*Absent shareholders.*—*Held* that a village administration-paper which provides for the surrender to absent shareholders on their return to the village of the lands formerly held by them does not necessarily constitute a valid trust in their favour, although it may be evidence of such a trust. Where a village administration-paper provided for the surrender to certain absent shareholders on their return to the village of the lands formerly held by them, but did not contain any declaration of a trust as existing between such absent shareholders and the occupiers of their lands at the time such administration-paper was framed,—*Held* that the administration-paper could not be regarded as evidence of a pre-existing trust between such persons, nor as an admission of such a trust by such occupiers. HARBHAI *v.* GUMANI **[I. L. R., 2 All., 493**

15. ——— *Absent co-sharer.*—*Wajib-ul-urz.*—*S.* and his brother owned an 8 annas share of a village, and *H.* and *D.* owned the other 8 annas share, the parties being related to each other by blood. In 1865 (Sambat 1921), at the settlement of the village, the following statement was recorded by the settlement officer in the wajib-ul-urz at the instance of *H.* and *D.*, with whom the settlement was made, *S.* and his brother being absent from the village and having been absent for some ten years: "We, *H.* and *D.*, are equal sharers of one 8 annas and *S.* and (his brother) of the other 8 annas in the village according to descent: ten years ago *S.* and (his brother) went away into Orai; their present residence is not known: they have not left woman, child, or heir of any kind in the village: on that account the entire 16 annas of the village are in possession of us, *H.* and *D.* At the time of the preparation of the khewat we made a gift of 4 annas of our own eight annas to *P.*, and have given him possession of 4 annas of the 8 annas belonging to *S.* and (his brother), keeping the remaining four annas in our own possession: when *S.* and

TRUST.—Property held on trust—*continued.*

(his brother) return to the village, we three who are in possession shall give up the 8 annas share of the aforesaid persons." In March 1880 *S.* sued *P.* for possession of the 4 annas mentioned in the wajib-ul-urz as having been made over to him by *H.* and *D.* out of the 8 annas share belonging to *S.* and his brother. He based his suit upon the wajib-ul-urz, but did not expressly state that the share in suit had been entrusted to *H.* and *D.* on the understanding that it should be returned to him when he reclaimed it. The lower Appellate Court dismissed the suit as barred by limitation, on the ground that *P.'s* possession of the share in suit became adverse in 1866 or 1867, more than twelve years before the institution of the suit, when *S.*, having returned to the village, had claimed the share and *P.* had refused to surrender it. On second appeal it was contended by *S.* that under the terms of the wajib-ul-urz *P.'s* possession was that of a trustee, and his possession could not be held to be adverse. *Per* SPANKIE, *J.*—That inasmuch as there was no direct evidence that the share in suit had been entrusted by *S.* to *H.* and *D.* on the understanding that it should be returned to him when he reclaimed it, and as such a trust could not be implied from the terms of the wajib-ul-urz, which amounted to nothing more than an acknowledgment of *S.'s* title and an offer to surrender possession when he returned, and as when he did return in 1866 or 1867 *P.* refused to surrender possession, *S.* was bound to have sued to recover the share in suit within twelve years from the date of such refusal, and as he had failed to do so, the suit was barred by limitation. *Per* PEARSON, *J.*—That although no mention was made in the wajib-ul-urz of such a trust as was contended for, yet the terms of that document strongly suggested the creation of such a trust. Having regard to the terms of the wajib-ul-urz, and to the fact that *S.* and his brother were not strangers to *H.* and *D.*, nor merely co-sharers, but near blood-relations, probably residing together on the same premises and partners in agricultural labours, further inquiry should be made with the view of elucidating the nature of the acquisition of *H.* and *D.* of the share and of their subsequent possession. SIRDAR SAINEY *v.* PIRAN SINGH . **I. L. R., 3 All., 453**

16. ——— Retirement and disability of trustees.—*Effect of, on trust.*—Where property is assigned to trustees by an insolvent trader for the purpose of having it equally distributed among his creditors, such a trust does not become inoperative by reason of the retirement of two out of three trustees, and of the inability of the third to discharge his duties properly. BAUMGARTNER *v.* STEPHENSON **[3 Agra, 321**

17. ——— Creditor's trust-fund.—*Unclaimed dividends, Suit for distribution of.*—Where a creditor's trust-deed contained no provision for redistribution of unclaimed dividends, and a suit was brought by the representatives of one of the creditors, party to the deed, for the administration and distribution of funds in the defendant's possession allotted to other creditors by way of dividends, but

TRUST.—Creditor's trust-fund—*continued.*

unclaimed by them for forty years,—*Held* that the plaintiff was not entitled to such relief. *Wilde* v. *Banning, L. R., 2 Eq., 577,* distinguished. MANICKAVELU MUDALI *v.* ARBUTHNOT & Co. **[I. L. R., 4 Mad., 404**

18. ——— Resulting trust.—*Intention of party.—Implied trust, Presumption of.*—Suit brought to recover possession of a talook, upon the alleged ground that the moneys with which the purchase was made were not the moneys of the person in whose name the property was bought, but of a lady with whom he was living as her husband, and that there was a resulting trust in her favour. The Privy Council considered that the very principle of a resulting trust was that the property had been purchased with money belonging to another, with an implied trust that it should belong to that other person to whom the money also belonged; but that if it was the intention of the person to whom the money belonged that there should be no such trust, no such implied trust could arise by implication, and the presumption would then be met by the facts. AMEEROONNISSA KHANUM *v.* ASHRUFFOONNISSA . **17 W. R., 259: 14 Moore's I. A., 433**

19. ——— *Statute of Frauds.*—*Stat. 29 Charles II., c. 3.*—The plaintiff, who was the widow of *G.*, sued the defendant, the executrix of *J.*, to recover a sum of R7,394-9-6, part of the purchase-money of a house which had been sold by *J.* in his lifetime, and which the plaintiff alleged had been, shortly before his death, conveyed by her husband *G.* to *J.* in trust to sell and hold the proceeds in trust for *G.'s* family. The defendant denied the trust and insisted that *J.* had purchased the house from *G.* for valuable consideration. Both *J.* and *G.* were Parsis. *Held* that, even assuming that no consideration was given by *J.* to *G.* for the house, the plaintiff was not entitled to succeed. In the absence of consideration, the trust of the house, which was admittedly conveyed by *G.* to *J.*, would have resulted to *G.*, unless, under the provisions of section 7 of the Statute of Frauds (29 Charles II., Cap. 3), he (*G.*) had declared in writing some other trust which was to supersede the resulting trust in his own favour. No such declaration of trust in writing was proved. If, on the other hand, the trust did result to *G.*, he, no doubt, might, as equitable owner of the house, have disposed of his interest by will. If he did so, the plaintiff had not qualified herself to sue as his representative. Probate had not been obtained of the will, and until the will was proved it could not be said that *G.* had made a particular declaration of trust by it. Nor without probate could the plaintiff take up the position of legal representative of her deceased husband entitled to enforce his rights, and, amongst others, his rights under the supposed resulting trust. Except as executrix or as administratrix the plaintiff could not recover property, or enforce rights equitably vested in her deceased husband. BAI MANECKBAI *v.* BAI MERBAI . . **I. L. R., 6 Bom., 363**

TRUST—*continued.*

20. ——— Breach of trust.—*Parties.*—*Defaulting trustees.*—*Breach of trust beneficial to trust-estate.*—The Court will not, at the instance of one of two defaulting trustees, declare the liabilities arising from a breach of trust without having all the parties concerned before it. Nor will the Court pass an order which might in any way tend to be construed as an assent to a breach of trust already committed, even though the breach may have been beneficial to the trust-estate. BARRY *v.* STEEL
[1 C. L. R., 80

21. ——— Revocation of trust.—*Voluntary settlement.*—*A.*, being at the time unmarried, executed a voluntary settlement by which he created trusts for himself for life, and after his death for his issue and widows (if any), with ultimate trusts over. The deed contained a provision empowering *A.* at any time, with the consent of the trustee, to revoke the trusts, and to declare any new or other trusts. *A.* subsequently married, and, after his marriage, executed a deed of revocation, declaring that the trust-property should be held for himself absolutely. The trustees refused to hand over the trust-property, and *A.* thereupon instituted a suit to have the trust set aside. His wife was a minor, and there was no issue of the marriage. *Held* that, although there might be cases in which, where no other person but the settlor was interested, the deed might be regarded as a mere direction as to the manner in which the settlor's property should be applied for his benefit, and as such revocable by the settlor, yet that, in the present case, there being an infant beneficiary, the deed could not be revoked. GOLAM YASSIN *v.* OFFICIAL TRUSTEE OF BENGAL
[I. L. R., 8 Calc., 887

TRUST-DEED FOR BENEFIT OF CREDITORS.

See BILL OF EXCHANGE.
[I. L. R., 3 Calc., 174

See DEBTOR AND CREDITOR.
[11 Moore's I. A., 317
3 Agra, 104, 321
8 Bom., A. C., 245
1 Bom., 233
I. L. R., 7 Bom., 101

TRUST-PROPERTY.

See COURT FEES ACT, SCH. I, ART. 11.
[6 B. L. R., Ap., 138
11 B. L. R., Ap., 39
7 B. L. R., 57
14 B. L. R., 184

TRUSTEE.

See COSTS—SPECIAL CASES—TRUSTEES.
[13 B. L. R., 383
I. L. R., 11 Calc., 628

See EXECUTOR . I. L. R., 2 Bom., 388

See HINDU LAW—ENDOWMENT—CREATION OF ENDOWMENT.
[14 B. L. R., 175
I. L. R., 9 Bom., 169
I. L. R., 4 Calc., 56

TRUSTEE—*continued.*

See HINDU LAW—ENDOWMENT—SUCCESSION IN MANAGEMENT.
[5 B. L. R., 181
I. L. R., 7 Mad., 499

See HINDU LAW—ENDOWMENT—TRANSFER OF RIGHT OF WORSHIP.
[3 C. L. R., 112

See INSOLVENT ACT, S. 40.
[I. L. R., 3 All., 799

See CASES UNDER LIMITATION ACT, 1877, S. 10 (1871, S. 10; 1859, S. 2).

See MALABAR LAW—JOINT FAMILY.
[I. L. R., 2 Mad., 328
I. L. R., 1 Mad., 153

See OUDH ESTATES ACT.
[I. L. R., 3 Calc., 522, 645

See PARTIES—PARTIES TO SUITS—DEBTOR AND CREDITOR, SUITS BETWEEN—
[I. L. R., 3 All., 799

See CASES UNDER TRUST.

See VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILITIES OF—
[7 B. L. R., 113

See WILL—CONSTRUCTION.
[4 B. L. R., O. C., 53
I. L. R., 5 Calc., 228

——— Constructive—

See INSOLVENCY—ORDER AND DISPOSITION . I. L. R., 2 Bom., 542

——— Claim to immoveable property against—

See CERTIFICATE OF ADMINISTRATION—RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE.
[I. L. R., 2 Calc., 45

See WILL—CONSTRUCTION.
[I. L. R., 2 Calc., 45

——— Distinction between trustee and director.

See COMPANY—POWERS, DUTIES, AND LIABILITIES OF DIRECTORS.
[6 B. L. R., 278

——— of temple, Breach of trust by—

See JURISDICTION OF CRIMINAL COURT.—GENERAL JURISDICTION.
[I. L. R., 1 Mad., 55

——— Suit by—

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—SPECIAL CASES OF CONSTRUCTION—VESTED AND CONTINGENT INTERESTS . I. L. R., 1 Bom., 269

1. ——— Relinquishment by one trustee.—*Effect of relinquishment.*—In a contest between three trustees or managers of an endowment,

TRUSTEE.—Relinquishment by one trustee—*continued.*

each entitled to a third share in the profits of the property, if one of them withdraws from the contest, his share is held to have been relinquished in favour of the remaining partners, and to have merged in the general account to be rendered by the trustees or managers. BUZL RUHIM *v.* LUTAFUT HOSSEIN. KHODEJOONNISSA BIBEE *v.* LUTAFUT HOSSEIN . . . . . **W. R., 1864, 171**

2. ——— Breach of trustees' duty.—*Mixing trust funds with money of trustees.—Commission on trust moneys.*—It is a grave breach of duty in trustees, or administrators taking out letters of administration, to estates in this country under powers of attorney from executors or next of kin abroad, to mix the incomes raised by them from trust properties, or the funds of the estate, in one common fund with their own moneys, and such a course of dealing may expose the trustees or administrators to criminal as well as civil liabilities. IN THE MATTER OF THE PETITION OF COWIE

[I. L. R., 6 Calc., 70: 7 C. L. R., 19

3. ——— Appointment of new trustees.—*Probate.—Executors.—Executors alienating property of their testator's estate before obtaining probate.—Title of alienees to such property.—Right of holder of property to vote at election of trustee before obtaining probate.—Trustee elected by debenture-holders.—Meeting of debenture-holders to elect a trustee.—Exclusion from meeting of holders of debentures obtained from executors before probate.—Validity of election of trustee elected at meeting from which such debenture-holders were excluded.*—In order to secure certain money which it had borrowed by the issue of debentures, the *D.* Company on the 23rd November 1883 conveyed certain lands, &c., to three trustees, *K.*, *G.*, and *D.*, by way of mortgage. With regard to the appointment of new trustees in case any trustee should die, &c., the indenture of mortgage provided that, in certain events, the surviving or continuing trustees might convene a meeting of the debenture-holders for the purpose of nominating a new trustee; and that at such meeting the election of such new trustee should be decided by a majority of votes of the debenture-holders present in person, each party having only one vote, and in case of an equality of votes, then the chairman of the meeting should have a casting vote. *K.*, one of the trustees appointed under the deed, died on the 9th February 1886, leaving a will whereby he appointed three executors. At the time of his death *K.* was the holder of one moiety of the debentures, *viz.*, 1,400 debentures of the value of R7,00,000. The two remaining trustees, *G.* and *D.*, called a meeting of the debenture-holders for the 27th February 1886 to elect a trustee. Previously to the meeting and for the purpose of having the large interests of *K.'s* estate adequately represented, the executors of *K.* distributed some of the debentures in their hands, belonging to *K.'s* estate, among nominees for the purpose of voting at the meeting; and they also sold some of the debentures. Among the persons to whom debentures were sold were the first three plaintiffs. Pursuant

TRUSTEE.—Appointment of new trustees—*continued.*

to the notice convening the meeting, the plaintiffs and other persons to whom debentures belonging to the estate of *K.* had been given or sold, presented themselves and claimed to attend the meeting; but none of them, except the three executors (plaintiffs 4, 5, and 6) of *K.* were allowed to attend, and they were admitted only in their capacity as executors. Defendant No. 1 was chairman of the meeting, and he ruled that the three executors had a joint right, in their capacity as executors, to give one vote upon any proposition that might be submitted to the meeting. At the meeting it was proposed that the holders of the debentures, who claimed admission to the meeting, should be permitted to attend. The chairman ruled the motion irrelevant, and would not allow it to be put. The executors, therefore, withdrew from the meeting. After they had withdrawn, the third defendant, *P.*, was elected a trustee. At the date of the meeting the executors had not obtained probate of *K.'s* will. On behalf of the defendants it was contended that *P.'s* election was valid; and that the persons to whom the executors had given or sold debentures belonging to *K.'s* estate had been properly excluded from the meeting of the 27th February, inasmuch as the executors had not at that time obtained probate, and, consequently, the title of their alienees to the debentures was still incomplete. *Held* that *P.* (defendant No. 3), had not been validly appointed a trustee to the indenture of the 23rd November 1883. Under that indenture, debenture-holders had the right to vote; and the debentures were payable to bearer. The fact that the executors had not at the date of the meeting obtained probate did not affect the rights of those to whom they had given or sold debentures, and such persons had, consequently, been improperly excluded from the meeting. MATHURADAS LOWJI *v.* GOCULDAS MADHOWJI

[I. L. R., 10 Bom., 468

4. ——— Breach of trust.—*Liability of passive trustee.*—A trustee who, having accepted a trust, remains passive and takes no steps to see the trust carried into execution, is liable for losses arising from the breach of trust of his co-trustee. BAI JADAV *v.* TRIBHUVANDAS JAGJIVANDAS

[9 Bom., 333

5. ——— Fiduciary relationship.—*Assignment by married woman.*—*L. M.* died in 1856, having bequeathed certain personal property to *J. S.*, who then and at the time of the subsequently-mentioned suit was a married woman, and who executed a power of attorney, authorising *O. G. & Co.* to receive payment of the legacy, and to execute a settlement of a portion of the same according to articles contained in the power. This settlement was made, and under it a portion of the legacy was assigned to trustees, who did not execute the deed or undertake the trust, and no other trustee was substituted for them. *O. G. & Co.* at various times advanced money to *J. S.*, and in acknowledgment received promissory notes from her for a portion of such advances; and in a suit by *O. G. & Co.* to recover the amount of these advances, it was held that

TRUSTEE.—Fiduciary relationship—*continued.*

O. G. & Co., standing in a fiduciary relation to *J. S.*, before they could avail themselves of her acts, must show that she did them with a full knowledge of the circumstances of the case and of her own position with regard to it. SMITH *v.* STEWART [Bourke, O. C., 292

TRUSTEE AND CESTUI QUE TRUST.

1. ——— Cause of action.—*Adverse possession.—Limitation.*—When property is placed in the hands of another by way of trust, no cause of action arises to the owner until there has been a demand by the owner for the restoration of the property and a refusal by the trustee to give up the property. The period of limitation begins to run from the date of such refusal or distinct assertion of adverse right, and not from the date the trustee enters into possession. RAKHALDAS MADAK *v.* MADHUSUDHAN MADAK [3 B. L. R., A. C., 409: 12 W. R., 319

2. ——— Suit to set aside alienations by trustee.—*Bonâ fide purchasers.*—A suit brought by a *cestui que* trust to set aside as fraudulent certain alienations made by the trustee was dismissed by the lower Appellate Court as barred by limitation, merely on the ground that more than twelve years had, at the commencement of the suit, elapsed since the execution of such deeds of alienation. *Held* (1) that this was not sufficient, and that the Court should have tried whether the purchasers were cognisant at the time of their purchase of a subsisting trust affecting the property, for if so they would have taken it subject to the trust, and would stand in the shoes of the original trustee, and would not be *bonâ fide* purchasers from trustees entitled to the benefit of the law of limitation; (2) that if the trustee had power to make valid grants, the grantees would have a perfectly good title, if they took for valuable consideration, without notice of the trust. LUTEEFUN *v.* BEGO JAN. BEGO JAN *v.* CHERAG ALI [5 W. R., 120

3. ——— Suit for mesne profits where estates had been under care of Court of Wards.—*Cause of action.—Fiduciary relationship.*—Plaintiff, the zemindar of Shivaganga, sued to recover two villages which she alleged formed part of the Shivaganga zemindari. The villages originally belonged to *P.*, mother of the present defendant, *B.*, the ex-zemindar of Shivaganga. In 1856 they were purchased by the Court of Wards on behalf of *B.*, who was then a minor, with part of the rents and profits of the zemindari, and in 1860 were given by him to his mother. In 1864 *B.* was ousted by a decree of the Privy Council, and became liable to the present plaintiff for the mesne profits of the zemindari. In the account taken of mesne profits due, the amount expended on the purchase of these villages was excluded by plaintiff's consent from the sum debited to the ex-zemindar. Plaintiff now sued *P.*, and, she dying, the suit was continued against *B.* as her representative. *Held* that there being in the decree of the Privy Council nothing directly giving a

TRUSTEE AND CESTUI QUE TRUST.—Suit for mesne profits where estates had been under care of Court of Wards—*continued.*

right to maintain the suit, there was but one ground upon which the suit could be supposed to lie,—namely, the existence of the relation of trustee and beneficiary between the Collector and the plaintiff at the time of the purchase. *Held*, also, that such relation did not exist. KATTAMA NACHIAR *v.* BOTHAGURUSAMI TEVAR . . . . . 6 Mad., 293

TRUSTEE ACT.

——— (XXIV of 1841).—*Application for appointment of new trustees.*—Trustees were appointed for a company in 1845, and the partnership was to last twenty years, which expired on December 31st, 1864. The shareholders thereupon appointed *S.*, a new trustee, to sell the business, and he sold it to *R.* The old trustees had left the country. In an application, with the consent of all parties, under Act XXIV of 1841, that *S.* might sign the deed of transfer, the Court held that it was necessary to show that the old trustees had no lien on any other property in the concern before the order asked for could be made. IN THE MATTER OF FORT GLOUCESTER MILLS CO. . Bourke, O. C., 260

——— (XXVII of 1866), s. 3.—*Hindu trusts.—Equitable jurisdiction of High Court.—Appointment of new trustee.—Supreme Court Charter, 1823.*—The High Court may exercise the summary powers conferred upon it by the Trustee Act (XXVII of 1866) in the case of Hindu trusts. Section 3 of the Trustee Act, which provides that the power and authority given by the Act to the High Court shall be exercised only "in cases to which English law is applicable," cannot be intended to limit the operation of the Act only to cases to which, in their whole extent, the law prevailing in England applies without qualification or reserve, as this would virtually exclude the Act in any case on which an Act of the Indian Legislature has any bearing. The cases referred to in the section must be cases to which English law is *in some measure* applicable, but in what measure is not indicated in the Act. English law must be regarded as applicable in the sense intended if the principles recognised by the English Equity Courts are applicable. At the date of the grant of the Charter to the Supreme Court of Bombay in the year 1823, English equity had become a system which would deal with a body of *quasi*-common law in a scientific manner and in obedience to known and uniform rules. When it applied its method to the determination or the constitution of a right, even based on the Hindu or Mahomedan law, it administered English law. In this sense "English law was applicable" at the date of the passing of the Trustee Act of 1866 to all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not be employed to subvert the native substantive laws, but they afforded a means of ameliorating them by a system

TRUSTEE ACT (XXVII of 1866, s. 3— *continued.*

of rules borrowed from the English Court of Equity. Trusts are recognised in the Hindu as well as in the English system of law. But while the substantive Hindu law insists strongly on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to its principles in cases of trust. If the Court is called on to give effect to a trust in any given case, it looks to the Hindu law of property to determine the estate of the trustee, but with reference to the duties of trustee and the rights of beneficiaries it is governed by the rules of English equity. There are no others that it can apply. In meeting an exigency, or in taking cognisance of a form of right not directly provided for in the Shastras, the Court, in exercising its jurisdiction under section 41 of the Charter of 1823, may apply Hindu law. But, taking Hindu law as one of its data, it applies "English law" also in the form of equity to all or nearly all the questions that arise. IN RE KAHANDAS NARRANDAS . I. L. R., 5 Bom., 154

——— **ss. 20 & 32.**—*Appointment of person to convey property on behalf of persons out of the jurisdiction and under other disabilities.* —Where property has been, by an order of Court, directed to be sold, and where some of the parties interested in such property are either out of the jurisdiction, married women, or minors, and the place of abode of others of them is unknown, the Court will, on petition, under the Trustee Act, appoint a person to convey the interest of such persons to any purchaser, notwithstanding that, at the time the order is applied for, no contract for the sale of the property has been entered into. But the Court cannot make such an order with respect to the interest of a party who has not been served, and who has not entered appearance. LACKERSTEEN *v.* ROSTAN [I. L. R., 7 Calc., 32

——— **s. 35.**—*Application for removal of trustee.—Ground for removal.—Stat. 13 & 14 Vict., c. 60, s. 32.*—Where a petition was presented to the High Court praying for the removal, under section 35, Act XXVII of 1866, of certain trustees of a will, on the grounds, *inter alia*, of misappropriation, waste, and breach of trust, and for the appointment of new ones,—*Held* that the matters alleged were much too grave to be disposed of on a mere application, and that as the respondents opposed the appointment of new trustees, the petitioners should institute a regular suit. Act XXVII of 1866, section 35, is analogous to 13 and 14 Victoria, Cap. 60, section 32. The Courts in this country ought, in analogy to the rulings of the English Court of Chancery, to refuse jurisdiction under this section on a mere application alleging misconduct or any other cause, when the trustees whom it is sought to remove are willing to act, and refer the applicant to a suit. IN THE GOODS OF POWELL . . . 6 N. W., 54

TRUSTEES AND MORTGAGEES ACT.

——— **(XXVIII of 1866), s. 43.**—*Administrator General.—Taking opinion of Court on question respecting the administration.—Question affecting rights of parties inter se.—Refusal of Court to express opinion.*—The Administrator General of Bombay having taken out letters of administration (having effect throughout the Bombay Presidency) to the estate of one *A. B.*, deceased, and having a balance in his hands to the credit of the said estate after having fully administered the same, was applied to by *G. B.*, the brother of the said *A. B.*, deceased, who had taken out letters of administration in England to the estate of his deceased brother, to hand over to him, the said *G. B.*, the balance in question, —the said *G. B.* claiming to be the administrator of the domicile of the deceased, and, as such, to be entitled to all the personal assets of his estate wheresoever situate. Being in doubt as to whether he might safely accede to the request, the Administrator General of Bombay, by petition under section 43 of the Trustees and Mortgagees Act, XXVIII of 1866, submitted the question to the High Court for its opinion, advice, and direction. *Held* that the question being one of considerable difficulty and importance, and involving, moreover, in its decision questions which might seriously affect the rights of parties *inter se*, it was not a question such as was contemplated by section 43 of the Trustees and Mortgagees Act, XXVIII of 1866, nor one upon which the Court ought to give any opinion merely on an *ex parte* petition of this character. IN RE THE GOODS OF BEERETON. IN THE MATTER OF THE TRUSTEES AND MORTGAGEES ACT, 1866 . . . I. L. R., 7 Bom., 381

TURN OF WORSHIP OF IDOL, RIGHT TO—

See DAMAGES—SUITS FOR DAMAGES—TORTS . . I. L. R., 3 Calc., 390

See LIMITATION ACT, 1877, ART. 131 (1871, ART. 131) . I. L. R., 4 Calc., 683
[I. L. R., 8 Calc., 807
6 B. L. R., 352: 15 W. R., 29

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UMPIRE, INCAPACITY TO ACT AS—

See ARBITRATION—APPOINTMENT OF ARBITRATORS AND UMPIRES.
[4 B. L. R., O. C., 89

UNCHASTITY.

See HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—WIDOW.
[12 B. L. R., 238
I. L. R., 1 Bom., 559
I. L. R., 7 Bom., 84
I. L. R., 9 Bom., 108

See HINDU LAW—STRIDHAN—EFFECT OF UNCHASTITY . I. L. R., 1 All., 46

See CASES UNDER HINDU LAW—WIDOW—DISQUALIFICATIONS—UNCHASTITY.

UNDERTAKING NOT TO SUE.

See ARREST—CIVIL ARREST.
[I. L. R., 1 Calc., 78

UNDERTAKING NOT TO SUE—*continued.*

See WARRANT OF ARREST—CRIMINAL CASES . 2 B. L. R., A. Cr., 17

UNDER-TENURE.

See JURISDICTION OF CIVIL COURT—REVENUE COURTS—ORDERS OF REVENUE COURTS . B. L. R., Sup. Vol., 625

See CASES UNDER SALE FOR ARREARS OF RENT—PORTION OF UNDER-TENURE, SALE OF—

See CASES UNDER SALE FOR ARREARS OF RENT—SALE OF UNDER-TENURE.

——— Avoidance of—

See CASES UNDER SALE FOR ARREARS OF RENT—INCUMBRANCES.

——— Suit to cancel—

See LIMITATION ACT, 1877, ART. 121 (1871, ART. 119) . I. L. R., 4 Calc., 860

UNDERWRITER, LIABILITY OF—

See INSURANCE—MARINE INSURANCE.
[I. L. R., 2 Bom., 550
12 Bom., 23

UNDUE INFLUENCE.

See CHAMPERTY . 13 B. L. R., 509

See VENDOR AND PURCHASER—INVALID SALES . . . 1 B. L. R., A. C., 95
[Cor., 57
I. L. R., 5 Bom., 450

See WILL—VALIDITY OF WILL.
[I. L. R., 7 Mad., 515

——— Onus of proof.—*Third party not in confidential relationship.*—A third person who, stands in no confidential relation to a grantor who is under age is not bound in the first instance to show that undue influence was used in a transaction. The subject of undue influence considered. RAJ COOMAR ROY *v.* ALFUZUDDIN AHMED . 8 C. L. R., 419

UNLAWFUL ASSEMBLY.

1. ——— Penal Code, s. 141.—*Rioting.—Assembly originally lawful.*—An assembly, lawful in its inception, may become unlawful by its acts. If force is used, the higher offence of rioting is committed. QUEEN *v.* KHEMEE SINGH .
[1 W. R., Cr., 19

2. ——— *Common object.*—In order to convict of the offence of being members of an unlawful assembly, it must be shown that the accused were actuated by a common object; and that the acts done by them were of such a nature as to make them guilty under section 141 of the Penal Code. QUEEN *v.* DINOBUNDO RAI
[9 W. R., Cr., 19

IN THE MATTER OF THE PETITION OF KOYLASH CHUNDER DASS . . 20 W. R., Cr., 78

3. ——— and s. 154.—*Owner of land on which unlawful assembly is held.—Common object.*—*Held* that the owner or occupier of land on which an unlawful assembly is held cannot be convicted under section 154 of the Penal Code, unless there is a finding that the riot was premeditated. Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one unlawful assembly, and to try them together, inasmuch as they do not have "one common object" within the meaning of section 141 of the Penal Code. QUEEN *v.* SURROOP CHUNDER PAUL
[12 W. R., Cr., 75

4. ——— *Affray and unlawful assembly.*—There is no ground for the distinction between an unlawful assembly as a premeditated act and an affray as a sudden one; for according to section 141 of the Penal Code, an assembly which was not unlawful when it assembled may subsequently become an unlawful assembly. IN THE MATTER OF THE PETITION OF LOKENATH KAR
[18 W. R., Cr., 2

5. ——— *Maintenance of rights.—Intention of parties.*—No charge of being members of an unlawful assembly under section 141, Penal Code, can be sustained, where the intention of the parties was not to enforce a right or supposed right, but to maintain undisturbed the actual subsisting enjoyment of a right which was at that time being exercised. SHUNKER SINGH *v.* BURMAH MAHTO
[23 W. R., Cr., 25

6. ——— *Person joining it and staying to prevent mischief to property.*—It cannot be said that a person intentionally joins an unlawful assembly or continues in it, when it appears from the evidence that he went to the place where the members of the unlawful assembly were gathered, to prevent mischief being done to his own property which he had a right to protect. BIRJOO SINGH *v.* KHUB LALL . . . . 19 W. R., Cr., 66

7. ——— *Ryots carrying away crops.*—Where the defendants, ryots of a portion of a zemindari sold in execution of a decree of the Civil Court, reaped and carried away their crops despite the purchaser's people, and refused to allow the purchaser's people to seal and mark grain which had been reaped, and the ryots were assembled in such numbers and so armed that nothing could be done against them,—*Held* by the High Court that the acts of the defendants did not amount to an offence under section 141 of the Penal Code. ANONYMOUS . . . . 4 Mad., Ap., 65

8. ——— cl. 4.—*Interrupting procession as a nuisance.*—*Held* that the act of the defendants in assembling and forcibly interrupting a procession was forbidden by clause 4 of section 141 of the Penal Code, although the defendants acted upon the ground that the procession was a nuisance or annoyance to them or their community. ANONYMOUS . . . . . 5 Mad., Ap., 6

9. ——— s. 143.—*Dispute as to possession of land.—Assembly going with armed*

UNLAWFUL ASSEMBLY.—Pension Code, s. 143—*continued.*

men to sow land.—On the trial of certain persons charged with being members of an unlawful assembly, it was proved that there was a dispute of long standing between the accused and certain other parties regarding the possession of certain land; that neither of the parties was in undisturbed possession of the land; that the accused went to sow the land with indigo, accompanied by a body of men armed with lattics; that they were prepared to use force, if necessary; and that the lattials kept off the opposite party by brandishing their weapons while the land was sowed. *Held* that the accused were rightly convicted of being members of an unlawful assembly, under section 143 of the Penal Code. *Shunker Singh* v. *Burmah Mahto, 23 W. R., Cr., 25,* distinguished. IN THE MATTER OF PEARY MOHUN SIRCAR. PEARY MOHUN SIRCAR *v.* EMPRESS

[I. L. R., 9 Calc., 639

S. C. IN THE MATTER OF PEARY MOHUN SIRKAR [13 C. L. R., 80

10. ——————— and s. 353.—*Using criminal force to public servant in execution of duty.—Resistance to search-warrant.*—Where the officer in charge of a police station required the officer in charge of another police station to cause a search to be made in a house within the limits of his station, and such officer, on being required, deputed two officers subordinate to him to make the search without delivering to them the order in writing required by section 379 of Act X of 1872, it was held that the persons resisting the search attempted could not be lawfully convicted under sections 353 and 143 of the Penal Code. QUEEN *v.* NARAIN

[7 N. W., 209

11. ——————— s. 147.—*Rioting.—Abating nuisance.*—*A.*, a joint owner of a parcel of land, erected on it an edifice without the consent of *B.*, another joint owner. A dispute arose and the Magistrate on inquiry ordered, under section 530 of the Criminal Procedure Code, 1872, *A.* to be put in possession of the part of the land on which the edifice had been erected. *B.* subsequently brought a suit in the Civil Court to establish his title to joint possession of the whole parcel, and for a declaration that *A.* was not entitled to erect any edifice thereon; and he further prayed that such edifice should be removed. *B.* obtained a decree, whereupon his servants went on the land and pulled it down. They were charged before the Deputy Magistrate with having committed mischief, and on this convicted and fined. On the 8th October the accused, who were the servants of *B.*, found the men in the employ of *A.* were putting up this erection, a nawbat-khana, again, and accordingly protested against its erection, pulled down the bamboos, thrust aside the servants of *A.*, throwing to the ground one man who was clinging to the bamboos. On the 9th October 1877 these servants were charged before the Magistrate with rioting, and convicted under section 147, Penal Code. *Held, per* JACKSON, *J.*, that, as the accused were not on the land in question as members of an unlawful assembly, nor for any unlawful purpose, the

UNLAWFUL ASSEMBLY.—Pension Code, s. 147—*continued.*

conviction, as well as the procedure, was illegal. *Held per* CUNNINGHAM, *J.*, that the accused were merely exercising the remedy of abating a private nuisance, and were exercising a legal right of self-defence. EMPRESS ON THE PROSECUTION OF DENONATH GHATTACK *v.* RAJCOOMAR SINGH

[I. L. R., 3 Calc., 573

S. C. IN THE MATTER OF THE PETITION OF RAJCOOMAR SINGH . . 2 C. L. R., 62

12. ——————— and s. 105, cl. 4.—*Mischief.—Right of defence of property.—Penal Code, s. 105, cl. 4.*—Where land in the possession of *A.* was encroached on by the servants of *B.*, who committed mischief on the land, and the servants of *A.* assembled and resisted the encroachments, the High Court declined to interfere with the Magistrate's order convicting the servants of *A.* of unlawful assembly, as there was error in law in the order of the Magistrate, who found as a fact that the right of defence of private property had ceased under clause 4, section 105 of the Penal Code. QUEEN *v.* RAJ KISTO DOSS . . . 12 W. R., Cr., 43

13. ——————— s. 149.—*Encouraging members of unlawful assembly.*—Where persons join an unlawful assembly for the purpose of committing an assault, and instead of preventing those armed from using their weapons encourage them to do so, they are in the same position as those members of the unlawful assembly who struck the blows. QUEEN *v.* DUSHRUTH ROY. . . . 7 W. R., Cr., 58

14. ——————— *Riot in which man was killed.—Culpable homicide.*—In a case of riot in which a man was killed, the whole of the members of the unlawful assembly, as well the victorious as the worsted, were held equally guilty of culpable homicide not amounting to murder. QUEEN *v.* MANA SINGH . . . . 7 W. R., Cr., 103

15. ——————— *Constructive murder under s. 34, Penal Code.—Effect on others charged under s. 149.—Per* FIELD, *J.*—Where a prisoner is constructively guilty of murder under section 34 of the Penal Code, it is doubtful if he can be said to have committed the offence of murder within the meaning of section 149, so as to make other prisoners, by a double construction, guilty of murder. IN THE MATTER OF THE PETITION OF JHUBBOO MAHTON. EMPRESS *v.* JHUBBOO MAHTON

[I. L. R., 8 Calc., 739

S. C. JHUBBOO MAHTON *v.* EMPRESS

[12 C. L. R., 233

16. ——————— *Common object.*—Where a person was killed by a member of an unlawful assembly, in prosecution of the common object of that assembly, the common object being the abduction of that person's mother,—*Held* that all those who were members of the assembly at the time such person was killed were guilty of the offence of killing her. IN THE MATTER OF GOLAM ARFIN

[4 B. L. R., Ap., 47

UNLAWFUL ASSEMBLY.—Pension Code, s. 149—*continued.*

S. C. QUEEN *v.* GOLAM AEFIN [13 W. R., Cr., 33

17. ——— and s. 300, excep. 2.—*Common object.—Murder.*—One member of an unlawful assembly, whose common object was to eject certain persons from a piece of land, the title to which was disputed, fired at and killed one of such persons. *Held* by COUCH, *C. J.*, and JACKSON, PHEAR, and PONTIFEX, *JJ.* (AINSLIE, *J.*, dissenting), that the act being sudden and unpremeditated, the other members of the assembly were not guilty of the offence of murder under section 149 of the Penal Code, but of rioting armed with a deadly weapon under section 148. QUEEN *v.* SABED ALI [11 B. L. R., F. B., 347: 20 W. R., Cr., 5

18. ——— *Common object.—Murder.*—A large body of men belonging to one faction waylaid another body of men belonging to a second faction, and a fight ensued, in the course of which a member of the first-mentioned faction was wounded, and retired to the side of the road, taking no further active part in the affray. After his retirement a member of the second faction was killed. *Held* (by NORMAN, *J.*, whose opinion prevailed) that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded, and that he could not, under section 149 of the Penal Code, be made liable for the subsequent murder. *Held* (by JACKSON, *J.*) that he remained a member of the unlawful assembly. QUEEN *v.* KABIL CAZEE . . . 3 B. L. R., A. Cr., 1

19. ——— *Prosecution of common object.*—If a body of men armed with latties, and under the leadership of one who to the knowledge of the rest is armed with a gun, assemble for the purpose of forcibly carrying off another man's property; and if in effecting that purpose, any one of the party, taking the gun, shoots and kills a person who is making a lawful resistance, the whole party may properly be convicted of murder under section 149 of the Penal Code. *Queen* v. *Sabed Ali, 11 B. L. R., 347 : 20 W. R., Cr., 5,* cited. HABI SINGH *v.* EMPRESS . . . . . 3 C. L. R., 49

20. ——— *Acts taking place after unlawful assembly is over.*—Where, after the object of an unlawful assembly had been accomplished, and the opposite party driven away, one of the members entered into an altercation with another and wounded him with a fish-spear, it was held that the act was not one done with a view to accomplish the common object of the assembly, or one which the rest knew would be likely to be committed in the prosecution of that object. QUEEN *v.* BINOD [24 W. R., Cr., 66

21. ——— ss. 151 and 188.—*Assembly of five or more persons.—Lawful command.*—Where the object of only three persons was to draw a crowd and their action was such as was calculated to and did draw a crowd of fifty or sixty persons likely to cause a disturbance of the public peace,

UNLAWFUL ASSEMBLY, ss. 151 and 188—*continued.*

—*Held* that the gathering constituted an assembly of five or more persons within the meaning of section 151 of the Penal Code (Act XLV of 1860), and that a refusal to disperse after being lawfully commanded to disperse rendered every member of the gathering liable to conviction under the said section. An order given by an officer superior in rank to an officer in charge of police stations commanding an assembly of five or more persons likely to cause a disturbance of the public peace to disperse, is a lawful order within the meaning of section 480 of the Code of Criminal Procedure (Act X of 1872). EMPRESS *v.* TUCKER . . . I. L. R., 7 Bom., 42

UNLIQUIDATED DAMAGES.

See INSOLVENT ACT, s. 40. [13 B. L. R., Ap., 2

See INTEREST—MISCELLANEOUS CASES—UNLIQUIDATED DAMAGES. [7 Bom., A. C., 89
9 Bom., 7

UNPROFESSIONAL CONDUCT.

See PLEADER—REMOVAL, SUSPENSION, AND DISMISSAL . 11 B. L. R., 312

UNNATURAL OFFENCE.

——— Penal Code, s. 377.—*Charge.—Particulars as to time, place, and person.—Criminal Procedure Code, 1882, s. 222.—Held,* where a person was tried for an unnatural offence and convicted on a charge which did not allege the time when, place where, or point to any known or unknown person with whom the offence was committed, and without any proof of these particulars, the facts proved against him only being that he habitually wore woman's clothes and exhibited physical signs of having committed the offence, that the conviction was not sustainable. QUEEN-EMPRESS *v.* KHAIBATI [I. L. R., 6 All., 204

UNSEAWORTHINESS.

See CONTRACT—CONDITIONS PRECEDENT. [2 B. L. R., O. C., 127

UNSETTLED POLLIAM.

——— Hereditary tenure.—*Evidence of possession or receipt of rent.*—There is no long uniform current of decisions at Madras sufficient to show that every polliam, not permanently settled, is necessarily only a tenure for life, or at the will of the Government. Each case must depend upon its own particular circumstances. The existence of a proprietary estate therein, and the tenure by which it has been held, are matters judicially determinable on legal evidence. In India the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary zemindari. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir. There is no difference in this

UNSETTLED POLLIAM.—Hereditary tenure—*continued.*

respect between a polliam and an ordinary zemindari. OOLAGAPPA CHETTY *v.* ARBUTHNOT. COLLECTOR OF TRICHINOPOLY *v.* LEKAMANI. PEDDA AMANI *v.* ZEMINDAR OF MARUNGAPURI
[14 B. L. R., 115: 21 W. R., 358
L. R., 1 I. A., 268, 282

S. C. in High Court. ARBUTHNOT *v.* OOLAGAPPA CHETTY . . . . . 5 Mad., 303

And LEKHAMANI *v.* RANGA KRISTNA MUTTA VIRA PUCHAYA NAIKAR. . 6 Mad., 208

UNSTAMPED DOCUMENTS, ADMISSIBILITY OF, IN EVIDENCE.

See CASES UNDER APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE ADMITTED OR REJECTED IN COURT BELOW—UNSTAMPED DOCUMENTS.

See CASES UNDER EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED OR UNREGISTERED DOCUMENTS.

UPAN CHOWKI TENURE.

See MESNE PROFITS—RIGHT TO AND LIABILITY FOR— . 1 B. L. R., A. C., 167

USER.

See CASES UNDER PRESCRIPTION.

See CASES UNDER RIGHT OF WAY.

Before the Limitation Act of 1871 no precise time had been laid down as sufficient to create a right of user.

See MULLICK KARIM BAKSH *v.* HARRIHAR MANDAR . 5 B. L. R., 174: 13 W. R., 440

KISTO MOHUN MOOKERJEE *v.* JUGGURNATH ROY JOOGEE . . . . . 11 W. R., 236

HURO SOONDUREE DEBIA *v.* RAM DHUN BHUTTACHARJEE . . . . . 7 W. R., 276

1. ——— **Proof of right of user.**—*"All along" or "from before."*—A user "all along" or "from before" does not necessarily prove a right. Its existence must be proved from a time from which the right would be gained or presumed to have been gained. MOOKTARAM BHUTTACHARJEE *v.* HURRO CHUNDER ROY . . . 7 W. R., 1

2. ——— ——— *Right to outlet for water.—Easement.*—In a suit to close up an outlet of water opened by the defendant, the lower Appellate Court found that the "outlet, or *seuch*" was used (*baraban*) all along, and that therefore the defendant had a right of user. *Held* that an enjoyment for at least twelve years is necessary to create a right by user, and that user by the defendant for that period at least had been found. KARTIK CHANDRA SIRKAR *v.* KARTIK CHANDRA DEY
[3 B. L. R., A. C., 166: 11 W. R., 522

3. ——— ——— *Use for many years.*—In a suit for a declaration of the right of user over the water of a tank, which right was denied, the finding of the lower Appellate Court, from the evidence of witnesses adduced by plaintiff, that plaintiff had used the water for many years, was held to be sufficient to prove a continuous and uninterrupted user on the part of the plaintiff. TOOLSEE DOSS KOBEERAJ *v.* BHYRUB LALL TEWAREE
[8 W. R., 311

USER.—Proof of right of user—*continued.*

4. ——— ——— *Prescription.—Ancient and uninterrupted right.—Easement.*—A party claiming the right of user by prescription over the property of another, must show not only that the right has existed from ancient days, but also that it has been exercised as of right, and has not been interrupted. MALLIK JAWAD-UL-HUQ *v.* RAM PRASAD DAS . . . . 3 B. L. R., A. C., 281

HEERALALL KOOER *v.* PURMESSUR KOOER
[15 W. R., 401

5. ——— ——— *Interruption of right of easement.*—The mere fact of user for any number of years will *not* be sufficient to confer a right, if the user be from time to time interrupted by the owner resuming, as occasion may require, the exclusive use of his land. In such a case the user will be treated as permissive merely, and not as the exercise of a right. AUKHOY COOMAR CHUCKERBUTTY *v.* MOLLAH NOBEE NOWAZ . 13 W. R., 449

6. ——— ——— *Wrongful interruption.—Acquiescence.*—Wrongful interruption does not destroy a right of user where steps are immediately taken to assert the right; but if this is not done for a length of time, acquiescence may safely be presumed. HEERALALL KOOER *v.* PURMESSUR KOOER . . . . . 15 W. R., 401

7. ——— ——— *Letting house to tenant.*—Where a right of user of a drain or passage is incidental to a house, that right is not affected by the owner of the house letting the house to a tenant. AMJUDEE BEGUM *v.* AHMED HOSSEIN
[6 W. R., 314

USUFRUCTUARY MORTGAGE.

See DECREE—FORM OF DECREE—MORTGAGE . . I. L. R., 1 All., 524

See CASES UNDER LEASE—ZUR-I-PESHGI LEASE.

See LIMITATION ACT, 1877, S. 19 (1859, S. 1, CL. 15)—ACKNOWLEDGMENT OF OTHER RIGHTS . 13 B. L. R., 177

See CASES UNDER MORTGAGE.

USURY.

See BENGAL REGULATION XV OF 1793.
[2 B. L. R., P. C., 44, 69

See HINDU LAW—ALIENATION—ALIENATION BY FATHER.
[I. L. R., 2 Calc., 213

USURY—*continued.*

See CASES UNDER HINDU LAW—USURY.

See CASES UNDER INTEREST—STIPULATIONS AMOUNTING TO PENALTIES OR OTHERWISE.

See CASES UNDER MAHOMEDAN LAW—USURY.

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VACATION, CLOSING OF COURT FOR—

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VAKIL.

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[11 B. L. R., 60, note

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——— Right of, to plead on original side of High Court.

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VALUATION OF APPEAL.

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See COSTS—SPECIAL CASES—VALUATION OF SUIT . . . 14 W. R., 255
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See RECORDERS ACT, S. 27.
[5 B. L. R., 305
8 B. L. R., Ap., 91

1. SUITS.

1. ——— Question of valuation.—*Procedure.*—Whether or not a suit has been properly valued is a preliminary question which ought to be disposed of before the case goes to trial. JOYTARA DASSEE *v.* MAHOMED MOBARUCK
[I. L. R., 8 Calc., 975: 11 C. L. R., 399

2. ——— Computation of value.—*Stamp duty.—Valuation of subject-matter for purpose of determining jurisdiction.*—The valuation of a suit for the purposes of stamp duty, and the valuation of the subject-matter of the suit for the purpose of determining the jurisdiction of the Court in appeal, are two different things. The value of the suit for the purposes of stamp duty is fixed by certain rules which determine an artificial value for those purposes. The value of the subject-matter of a suit on appeal, on which depends the jurisdiction of the several grades of civil suits, is the actual value of the property in litigation. AUKHIL CHUNDER SEN ROY *v.* MOHINY MOHUN DASS
[I. L. R., 5 Calc., 489: 4 C. L. R., 491

3. ——— *Valuation for purposes of jurisdiction.—Court Fees Acts.*—The valuation of suits for the purpose of jurisdiction, is perfectly distinct from their valuation for the fiscal purpose of court fees. Therefore court Fees Acts, which are fiscal enactments, are not to be resorted to for construing enactments which fix the valuation of suits for the purpose of determining jurisdiction. DAYACHAND *v.* HEMCHAND DHARAMCHAND
[I. L. R., 4 Bom., 515

4. ——— *Jurisdiction of Munsif.—Mad. Reg. VI of 1816, s. 11, and III of 1833.*—The valuation of the matters of litigation for the purpose of determining the jurisdiction of Munsifs is to be made in the mode prescribed by section 11, Regulation VI of 1816, and Regulation III of 1833, and not in that prescribed in the Stamp Acts. THIAGARAJA MUDALI *v.* RAMANUJA CHARRY,

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

Computation of value—*continued.*

CHINNASAMI CHETTI *v.* NANJAPPASARY. JUNJLA VENKATARAYADU *v.* JUNJLA KAMAMMAH [6 Mad., 151

5. ——— *Court Fees Act, 1870, s. 12.—Class of suit in which particular suit ranks.*—Section 12 of the Court Fees Act, which makes the decision of a Court in which a plaint or memorandum of appeal is filed final on questions relating to valuation for the purpose of determining the amount of any fee chargeable, does not affect a question as to the class of suits in which a particular suit ranks. ANNAMALAI CHETTI *v.* CLOETE [I. L. R., 4 Mad., 204

6. ——— *Court Fees Act, 1870, s. 12.—Non-payment of sufficient court fee.*—Section 12 of the Court Fees Act, VII of 1870, applies merely to the valuation of property for the purpose of calculating the court fee when there is no question as to the article of the schedule of the Act with reference to which the valuation is to be made, and does not apply to a case in which it is contended that the property has been wrongly valued, but that the relief has been improperly estimated by putting it under a wrong article in the schedule of the Act. It does not contemplate a case on which the Court refuses to hear a suit on the ground that a sufficient court fee has not been paid. See *Ajoodhya Pershad Singh* v. *Gunga Pershad, I. L. R., 6 Calc., 249 : 6 C. L. R., 567.* OMRAO MIRZA *v.* JONES [12 C. L. R., 148

7. ——— *Jurisdiction.—Market value of subject-matter, Mode of computing.—Court Fees Act (VII of 1870), ss. 6 and 12.*—For the purpose of determining the question of jurisdiction, the valuation of a suit should be computed according to the market value of the subject-matter of the suit, and not by the special rules applicable to valuation laid down in Act VII of 1870. NANHOON SINGH *v.* TOFANEE SINGH [12 B. L. R., 113 : 20 W. R., 33

JEEBRAJ SINGH *v.* INDERJEET MAHTOON [12 B. L. R., 115; note : 18 W. R., 109

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KALU BIN BHIWAJI *v.* VISHRAM MAWAJI [I. L. R., 1 Bom., 543

BAI MAHKOR *v.* BULAKHI CHAKU [I. L. R., 1 Bom., 538

8. ——— *Market value.—Valuation for stamp purposes.*—Where a Court is satisfied that the market value of the subject of a suit or appeal presented to it is of such an amount as to bring the suit or appeal within its jurisdiction, it is bound to receive it. The Court will generally assume that the value of the property in suit is that arrived at by the computation for the purposes of ascertaining the stamp duty where the Stamp Act prescribes arbitrary principles of calculation; but

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

Computation of value—*continued.*

where it is asserted and shown to the satisfaction of the Court that the market value is in excess of the amount computed for such purposes, the Court must take notice of the actual market value. DHUNNOO *v.* DAMODUR DOSS . . . . 2 N. W., 177

9. ——— *Cases in which revenue cannot be calculated.—Market value.*—In cases where, for the purpose of the stamp on an appeal, it is impracticable to ascertain accurately what portion of permanent revenue has been assessed on the lands in dispute in a suit, the appellant should furnish to the Registrar a memorandum giving an estimate of the market value and the date on which it has been calculated. If the Registrar consider the estimate clearly insufficient, the Court will issue a commission to ascertain the proper market value. The provisions of schedule B of Act XXVI of 1867 considered. EX PARTE MOONEE RANGAPPEN [3 Mad., 352

10. ——— *Dispute as to proper valuation.*—On a dispute arising as to the proper valuation of a suit, the Court may, on the application of either party, issue a commission and make an inquiry into the market value or the net profits of the property in dispute. The final decision as to the proper valuation is vested in the Court which hears the suit. UMA SANKAR ROY CHOWDRY *v.* MANSUR ALI KHAN [5 B. L. R., Ap., 6 : 13 W. R., 327

See WAJID ALI KHAN *v.* LALA HANUMAN PRASAD [4 B. L. R., A. C., 139 : 12 W. R., 484

11. ——— *Costs.*—In estimating the value of a suit, the costs must not be included in the amount in dispute. NILMADHAB DAS *v.* BISWAMBHAR DAS [3 B. L. R., P. C. 27 : 12 W. R., P. C., 29 13 Moore's I. A., 85

12. ——— *Character of suit.—Valuation altering with wording of plaint.*—A suit should be valued according to its real character. Where a plaint is so worded as that, taken strictly, the valuation would be such that the Court in which the plaint was filed would have no jurisdiction, the mere miswording of the plaint will not oust the Court of its jurisdiction. AJOODHIA LALL *v.* GUMANI LALL . . . . 2 C. L. R., 134

13. ——— Incorrect valuation.—*Appellate Court.—Ground for dismissal of suit.*—The valuation of a suit must be taken from the statement in the plaint, and if, after going into the evidence, it is found that a particular item is improperly claimed, the Court has means of punishing the plaintiff by saddling him with costs or in any other way; but the whole suit should not be dismissed simply because, in the opinion of the lower Appellate Court, it ought to have been valued within the limits of the jurisdiction of the Small Cause Court. MOHEE LALL *v.* KHETARAM MARWARY . . . . 25 W. R., 76

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

14. ——— Valuation of amended plaint.—*Valuation ascertained at date of filing and at date of amendment.*—The proper valuation in the case of an amended plaint is that ascertained at the date of the amendment, and not at the date of the original filing of the plaint. MORO VISHVANATH *v.* GANESH VITHAL . . . . **10 Bom., 444**

15. ——— Valuation of plaint presented again after return of plaint.—*Return of plaint for want of jurisdiction.—Second presentation under Court Fees Act, 1870.—Act XXVI of 1867, Plaint presented under.*—Where a plaint in a suit was originally presented, when Act XXVI of 1867 was in force, in the Court of the Munsif, and, being above the amount for which that Court had jurisdiction, was returned for presentation to the Subordinate Judge, and when presented there it was admitted and heard, and afterwards it was found that under Act VII of 1870, the Court Fees Act which was then in force, the lower standard of valuation necessary would have made it cognisable by the Munsif,—*Held* that by analogy to the cases which decide that the date of a suit for the purposes of limitation is the date when the plaint was originally presented, the suit must be assumed to have been brought when the plaint was filed in the Munsif's Court, and therefore was properly valued under Act XXVI of 1867. KHELLAT CHUNDER GHOSE *v.* NUSSEEBUNNISSA BIBEE . . . . . **16 W. R., 47**

16. ——— Account, Suit for.—*Court Fees Act, 1870, s. 7, cl. f, and s. 11.*—By section 7, clause *f*, of the Court Fees Act, VII of 1870, the plaintiff in a suit for accounts must state the amount at which he values the relief sought; but he is free to fix it as he thinks proper, subject to the provisions of section 11 which preclude the execution of the decree in case it exceeds such value until the execution fee has been paid. GOVINDAS *v.* DAYABHAI **[I. L. R., 9 Bom., 22**

17. ——— Adoption, Suit to set aside—*Suit by reversioner.—Jurisdiction.*—For the purpose of determining the jurisdiction over a suit by a reversioner to set aside an adoption, the loss which would accrue to the adopted person, should the adoption be declared invalid, is the measure of the value of the subject-matter of the suit. KESHAVA SANABHAGA *v.* LAKSHMINARAYAN. **[I. L. R., 6 Mad., 192**

18. ——— Annuity, Suit for declaration of right to.—*Act XXVI of 1867.—Stamp Act, 1862, sch. A, cl. 2.*—In a suit for a declaration of right to an annuity (varshasan) it was held that the stamp for the petition of special appeal should be regulated by the market value of the annuity, and that *primâ facie* ten times the amount of the annuity might be assumed to be its market value, as enacted for analogous agreements by section 2, schedule A, Act X of 1862. NARSINVACHARYA *v.* SVAMI RAYA CHARYA . . . . . **5 Bom., A. C., 55**

19. ——— Attachment, Suit to set aside.—*Suit by trustees' deed given by insolvent for benefit of creditors.*—The valuation for stamp duty of a suit brought by the trustees of an assignment by an insolvent trader for the benefit of his creditors to set aside an attachment by an execution-creditor, should be calculated on the value of the lien claimed by the judgment-creditor. STEPHENSON *v.* BAUMGARTNER **[3 Agra, 104**

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

Attachment, Suit to set aside—*continued.*

20. ——— Suit under Civil Procedure Code, 1882, s. 283.—Stamp.—Possession.—*Court Fees Act, VII of 1870, sch. II, art. 17, cl. 1.*—When a party prefers a claim or makes any objection to the attachment of any property in execution of a decree, but fails to establish it, and brings a suit under section 283 of the Code of Civil Procedure (Act XIV of 1882) to establish his right to the property attached, his plaint is to be treated as falling under article 17, clause 1 of schedule II of the Court Fees Act, VII of 1870, and is chargeable with only a ten-rupee stamp, notwithstanding that the plaintiff may pray in such a suit to be awarded possession. *Parvati* v. *Kisan Sing, Judgments for 1881, p. 121,* followed; *Gunpatgir Guru Bholagir* v. *Gunpatgir, I. L. R., 3 Bom., 230,* distinguished. DHONDO SAKHARAM *v.* GOVIND BABAJI . **I. L. R., 9 Bom., 20**

21. ——— Attachment, Suit to set aside order removing.—*Court Fees Act, VII of 1870, ss. 6 and 12, and sch. II, art. 17, cl. 1.—Valuation by subordinate Court.—Suit to re-establish judgment-debtor's right to property on removal of attachment.*—Where, on the removal of an attachment at the instance of a third party, the judgment-creditor brought a suit to establish the right of his judgment-debtor to the property from which the attachment had been removed, and to get the summary order to remove the attachment set aside,—*Held* that the proper stamp on a plaint of that kind was R10 under section 6 and schedule II, article 171 of the Court Fees Act, VII of 1870. VITAL KRISHNA *v.* BALKRISHNA JANARDAN **[I. L. R., 10 Bom., 610**

22. ——— Award, Suit to carry out.—A suit to carry out an arbitration award need not be valued. KHODA BUKSH *v.* MOWLA BUKSH **[14 W. R., 255**

23. ——— Award, Application to file.—*Civil Procedure Code, 1882, s. 525.*—The proper court fee upon an application to file an award under section 525 is the court fee prescribed for applications, and not the court fee upon a plaint. BIJADHUR BHUGUT *v.* MONOHUR BHUGUT **[I. L. R., 10 Calc., 11**

S. C. PALUT BHAGUT *v.* MONOHUR BHAGUT.

24. ——— Charge on property, Suit to establish.—*Mad. Civil Courts Act, 1873.—Subject-matter of suit.*—For the purposes of jurisdiction (Madras Civil Courts Act, 1873) the subject-matter of a suit to establish the validity of a charge upon property is, when the property is in excess of the charge, the amount of the charge; when the charge

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

Charge on property, Suit to establish—*continued.*

is in excess of the property, the value of the property. KRISHNAMA CHARYAR *v.* SRINIVASA AYYANGAR . . . . . I. L. R., 4 Mad., 339

25. ——— Damages, Suit for.—In determining the jurisdiction of the Court in a suit for damages, the amount claimed, and not that eventually found due, must be taken as the valuation. JOY DOORGA DASSEE *v.* MANICK CHAND BABOO [16 W. R., 248

26. ——— Declaratory decree, Suit for. —*Suit to establish right to attached property.*—*Held* that, in the case where a person has preferred a claim to property attached in the execution of a decree, on the ground that such property is not liable to such attachment, and an order is passed against him, and he sues to establish his right to such property, the value of the subject-matter in dispute in such suit, for the purposes of jurisdiction, will be the amount of such decree. Second Appeal No. 320 of 1876, decided the 16th May 1876, followed. GULZARI LAL *v.* JADAUN RAI . I. L. R., 2 All., 799

27. ——— *Suit to establish right by reversal of deeds.*—When a plaintiff only sues for declaration of his title to certain lands on reversal of the kobalas said to have been illegally executed by his father, he need not be compelled to value the case at the total of the consideration mentioned in those deeds. SHEO GHOLAM SINGH *v.* BEJOYRAM PROTAB SINGH . W. R., 1864, 317

28. ——— *Plaint insufficiently stamped.—Court Fees Act, VII of 1870, s. 12.*—The law allows a plaintiff in some cases to rectify a mistake as to stamp duty, but this privilege is subject to qualification, and does not exist where the relief to be granted is altogether distinct from that originally sought. In such a case, the plaintiff should not be allowed to put an additional stamp on his plaint. Where a plaintiff sued on a stamp of R10 for a declaration of his title to land worth R19,000, in the possession of the defendant, it was held that the suit could not be maintained, and that the plaintiff was not entitled to put an additional stamp on the plaint and convert his suit into one for possession. CHOKALINGAPESHANA NAICKER *v.* ACHIYAR . . . . . I. L. R., 1 Mad., 40

29. ——— *Court Fees Act (VII of 1870), s. 4, and sch. II, art. 17, cls. 3 and 6.— Jurisdiction.— Bom. Civil Courts Act, XIV of 1869, s. 24.*—A Subordinate Judge of the 2nd class has no jurisdiction to entertain a suit for the declaration of the plaintiff's title where the property in respect of which the declaration is sought exceeds R5,000 in value. The law may lay down, for purposes of revenue, certain rules for the valuation of suits; but such valuation cannot be accepted as a criterion of the actual amount or value of the claim, upon which the jurisdiction of a Court depends.

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

Declaratory decree, Suit for—*continued.*

Whether a suit be merely to obtain a decree, declaratory of the plaintiff's title to, or whether it be to establish his title, coupled with a prayer for possession of, the rights of a deceased person, the inheritance is the object in dispute. The actual value of the estate to which the plaintiff claims to be entitled, and not the value which it may eventually represent to the plaintiff, is the value of the subject-matter. BAI MAHKOR *v.* BULAKHI CHAKEE [I. L. R., 1 Bom., 538

30. ——— *Court Fees Act, s. 12, and sch. II, art 17, cl. 3.—Consequential relief.—Appeal.—Civil Procedure Code, 1859, s. 246.*—Section 12 of the Court Fees Act prohibits appeals on questions relating to valuation for the purpose of determining the amount of a fee, but does not prevent a Court of Appeal from determining whether or not consequential relief is sought in a suit, so that it may determine under what class of cases the suit falls for the purposes of the Court Fees Act. A suit by a person against whom an order has been made, under section 246 of Act VIII of 1859, disallowing his claim to the attached property, need not be valued according to the value of the property, but can be brought on a stamp of R10, under Act VII of 1870, schedule II, article 17 (iii). CHUNIA *v.* RAM DIAL [I. L. R., 1 All., 360

31. ——— *Suit to stay butwara proceedings under Beng. Reg. XIX of 1814, after partition by private arrangement.*—An allottee, under a private partition, sued to stay subsequent partition proceedings brought under Regulation XIX of 1814, and to have his possession confirmed. The defendants objected to the valuation of the suit and to the suit being heard by the Civil Courts, no proceedings having first been instituted before the revenue authorities. *Held* that such a suit should be considered to be one for a declaratory decree, or for something in the nature of an injunction, and that, therefore, the plaint should not be stamped according to the value of the entire estate. JOYNATH ROY *v.* LALL BAHADOUR SINGH [I. L. R., 8 Calc., 126: 10 C. L. R., 146

32. ——— Deed, Suit to set aside.—*Suit for cancellation of bond.—Value of subject-matter of suit.—Jurisdiction.*—The value of the subject-matter of a suit for the cancellation of a bond is to be determined with reference only to the principal amount, and not that amount together with the interest payable thereon when the suit is instituted. GULAB RAI *v.* MANGLI LAL . I. L. R., 6 All., 71

33. ——— *Appeal. — Suit for cancellation of a document.—Jurisdiction.*—The plaintiffs sued for the cancellation of a bond for the payment of R6,000, together with interest thereon at the rate of 4 per cent. per mensem, alleging that they had executed such bond under the impression that it was a bond for the payment of R3,000, together with interest thereon at the rate of 1½ per cent.

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

Deed, Suit to set aside—*continued.*

per mensem, whereas the defendants had fraudulently caused them to execute the bond in suit. The plaintiffs paid into Court R3,000, together with interest at the rate of 1½ per cent. per mensem. *Held* that the value of the subject-matter in dispute was the difference between R3,000 and R6,000 or thereabouts, and therefore an appeal from the decree of the Court of first instance preferred to the District Judge was cognisable by him. KALI CHARAN RAI *v.* AJUDHIA RAI . . . I. L. R., 2 All., 148

34. ——— *Deed prejudicing title to immoveable property.*—In a suit to annul a sale-deed which prejudices the title of the plaintiffs to immoveable property, a stamp calculated on the consideration-money mentioned in the sale-deed is sufficient. THAKOOR PATHUK *v.* RAM SOOMRUN LAL [2 N. W., 433

35. ——— *Suit to set aside sale-deed as being forged.*—A suit to set aside a false sale-deed was held to be sufficiently valued at the sum mentioned in that sale-deed. THAKOOR PATUCK *v.* RAMSOOMRUN LALL . 1 N. W., 17 : Ed. 1873, 16

36. ——— *Suit to cancel document on ground of fraud.*—The plaintiff executed a document whereby he created a charge of R4,500 upon certain immoveable property. In a suit to cancel the document upon the ground of fraud, —*Held* that the plaintiff valued his relief at R4,500, and that the District Munsif had no jurisdiction to try the suit. NARAINA PUTTER *v.* AYA PUTTER [7 Mad., 372

37. ——— *Suit for possession of property alienated.—Price stated in sale-deed.* —In a suit for possession of a share of an undivided estate and to set aside a kobala by which the estate had been illegally alienated, the plaintiff is not bound to value his claim according to the price stated in the kobala. AUGOPURA CHOWDHRY *v.* MEAH BIBEE [10 W. R., 207

38. ——— Ejectment, Suit for,—*Market value of tenant-right.*—Where a landlord claims to eject a tenant, he claims to recover the tenant-rights in the holding, and the stamp duty chargeable on the plaint should be determined with reference to the market value of that right only. AJOODHYA CHOWBEY *v.* DAIBEE SINGH . . 3 Agra, Rev., 5

39. ——— *Suit to contest claim of occupancy ryot.—Court Fees Act, 1870, s. 7, cl. 11, and sch. II, cl. 5.*—In a suit to eject a defendant as being a tenant at will, the court fee upon the plaint or memorandum of appeal is 8 annas under schedule II, clause 5 of Act VII of 1870. Clause 11 (*d*) of section 7 of that Act applies only to suits brought by a tenant to dispute the validity of his landlord's notice to quit. NURJAHAN *v.* MARPAN MUNDUL . . . . . 11 C. L. R., 91

40. ——— *Suit to have a lease set aside and buildings erected by lessess demolished.—Suit for possession of land and demolition of buildings erected thereon.—Court Fees Act.—Beng. Civil Courts Act, ss. 20, 22.*—Certain co-sharers of a village sued to have a lease of certain land, the joint undivided property of the co-sharers, which the other co-sharers had granted, set aside, and to have the building erected on such land by the lessess demolished, on the ground that such lease had been granted without their consent. They valued the relief sought at R100. The value of the buildings of which they sought demolition was R3,000. *B.* sued *N.* claiming *inter alia* possession of certain land and to have certain buildings erected thereon by the defendant demolished. *Held*, with reference to the above-mentioned suits, that in estimating their value for the purposes of the Court Fees Act, 1870, or of the Bengal Civil Courts Act, 1871, the value of the buildings which might have to be demolished should not be taken into account. JOGAL KISHOR *v.* TALE SINGH. BINDESHRI CHAUBEY *v.* NANDU [I. L. R., 4 All., 320

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

Ejectment, Suit for—*continued.*

41. ——— Emoluments attached to office, Suit for.—*Court Fees Act, 1870, s. 7, cls. 2, 4.—Claims for future emoluments.—Jurisdiction.—Mad. Civil Courts Act, 1873, s. 12.—Portion of claim struck out and plaint returned for presentation to inferior Court.*—In a suit filed in the Court of a Subordinate Judge, the plaintiff prayed, *inter alia*, for a decree for the payment, annually, of the emoluments attached to a certain office, or their value at a rate stated in the plaint. This portion of the claim he valued, under clause 2 of section 7 of the Court Fees Act, at ten times the amount of the value claimed for one year. The value of the claim thus stated exceeded the pecuniary limit of the jurisdiction of the District Munsif. The Subordinate Judge held that this portion of the claim was not actionable, inasmuch as the right to the emoluments was conditional upon services to be rendered, and did not fall under clause 2 of section 7 of the Court Fees Act, not being a fixed sum payable periodically, and therefore he held that the plaint was improperly valued, that the suit was not within his jurisdiction, and that the plaint should be returned to be presented to the proper Court. *Held* that this order was right. KRISHNAN *v.* REVI VARMA [I. L. R., 8 Mad., 384

42. ——— Instalment bond, Suit on. —The stamp on a plaint on an instalment bond should be estimated, not on the amount of the whole bond, but on the amount claimed in the suit. SUTTO BHAMA DOSSEA *v.* JAMEERUDDY KHAN [4 W. R., S. C. C. Ref., 12

43. ——— Khoti estate, Suit for recovery of.—*Act XXVI of 1867, sch. B, cl. 11. Amount of assessment.—Held* that a khoti estate is an estate paying revenue to Government upon which an assessment is temporarily settled, and that a suit for its recovery should be assessed at eight times the annual assessment under Act XXVI of 1867, schedule B,

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

Khoti estate, Suit for recovery of—*continued.*

article 11, note (*a*), Sp. Rule 1 for the Bombay Presidency. EX PARTE VITHAL *alias* GOPAL GONESH BIVALKAR . . . 4 Bom., A. C., 148

44. ——— Manager, Suit to remove.—*Court Fees Act, 1870, s. 7.—Suit to eject trustee.—Jurisdiction.—Specific Relief Act, s. 42.*—By an agreement between *S.* and *M.*, members of the same Hindu family, it was arranged that certain immoveable property dedicated to charitable uses by the family should be managed by *M.*, subject to the supervision of *S.*, and that *M.* should render accounts to *S.* and observe certain other conditions. *S.* sued *M.* in the Court of the District Munsif, and prayed for a decree for the removal of *M.* as manager and for the appointing of himself as manager of the property. *M.* objected that the Court had no jurisdiction, because the property exceeded in value the pecuniary limits of the jurisdiction of the District Munsif's Court as fixed by section 12 of the Madras Civil Courts Act, 1873. *Held* that *S.* was not entitled to sue for the removal of *M.* without praying for his ejectment from the property, and that, as the property exceeded in value R2,500, the District Munsif had no jurisdiction. SONACHALA *v.* MANIKA [I. L. R., 8 Mad., 516

45. ——— *Karnavan of Malabar tarwad.—Mad. Civil Courts Act, 1873, s. 13.*—For the purpose of jurisdiction a suit to remove the karnavan of a Malabar tarwad is not a suit for the recovery of the tarwad properties managed by the karnavan and to be valued as such, but a suit which asks for a relief that is incapable of valuation. NARANJOLI CHIRAKAL KUNHI RAMAN *v.* NARANJOLI CHIRAKAL PUTTALATHU KUNHUNNI NAMBIAR . . . I. L. R., 4 Mad., 314

46. ——— *Suit for removal of karnavan.—Court Fees Act, 1870, sch. II, art. 17, cl. 6.*—A suit for the removal of a karnavan of a Malabar tarwad on the ground of misfeasance is incapable of valuation and falls under section 6, article 17, schedule II of the Court Fees Act, 1870. GOVINDAN NAMBIAR *v.* KRISHNAN NAMBIAR [I. L. R., 4 Mad., 146

47. ——— Mesne profits, Suit for.—*Denial of plaintiff's title.*—In a suit for wasilat, the stamp on the plaint will be sufficient if it cover the amount claimed for wasilat, notwithstanding the defendant may deny the title of the plaintiff to the land. KADIR BUKSH *v.* WISE [Marsh., 165 : 1 Ind. Jur., O. S., 103 1 Hay, 370

48. ——— *Suit for possession and mesne profits.*—Where a suit for mesne profits is united with one for possession, no separate stamp-fee is necessary in respect of mesne profits. SYEDUN *v.* ALLAH AHMED . W. R., 1864, 327

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

49. ——— Partition, Suit for.—*Madras Civil Courts Act, s. 12.—Jurisdiction.—Subject-matter of suit.*—In suits for partition, the value of the property of which the plaintiff claims a share, and not the value of the share claimed, determines the jurisdiction of the Court under section 12 of the Madras Civil Courts Act, 1873. VYDINATHA *v.* SUBRAMANYA . . I. L. R., 8 Mad., 235

50. ——— *Hearing fee, Calculation of.—Market value of property.*—The ordinary rule for assessing the hearing fee according to the market value of the property in suit is not applicable to a suit for partition, and the Court in each case ought to fix the amount of such fee. Generally speaking, the value of the suit is the difference between the value after partition of the plaintiff's share which he requires to be partitioned and the value of the same share not partitioned. KIRTEE CHUNDER MITTER *v.* ANNATH NATH DEB [13 C. L. R., 253

51. ——— *Suit for division of lands according to established custom.*—A co-owner of village lands sued in 1861 to have them divided among the villagers according to a custom (last observed in 1835) that at the expiration of every twelve years the lands should be re-distributed by lot among the co-owners, and to have two of the shares delivered to him as one of such co-owners. In 1851 another co-owner had, in a suit to which some only of the present defendants were parties, obtained a decree for the periodical allotment of the lands; and in 1853 such decree, which clearly recognised the existence and validity of the custom, was affirmed on appeal. *Held* that the plaintiff need not pay an institution fee on the aggregate amount of the value of all the sharers in the village, and that the stamp on the plaint need only be proportioned to the value of the property actually sued for. VENKATASVAMI NAYAKKAN *v.* SUBBA RAU. SANKARA SUBBAIYAN *v.* SUBBA RAU . . . . 2 Mad., 1

52. ——— *Jurisdiction.—Subject-matter of suit.—Act XIV of 1869, s. 25.*—What *primâ facie* determines the jurisdiction of a Court is the claim, or subject-matter of the claim, as estimated by the plaintiff; and the determination having given the jurisdiction, the jurisdiction itself continues, whatever the event of the suit. And this is so notwithstanding a *bonâ fide* error in the estimate made by the plaintiff, but plaintiff cannot oust the Court of its jurisdiction by making unwarrantable additions to the claim which cannot be sustained, and which there is no reasonable ground for expecting to sustain. The subject-matter of a claim, within the meaning of section 25 of Act XIV of 1869, is the specific thing sought by the plaintiff. In a partition suit, where the plaintiff seeks for a division and separate possession of his share in joint property, it is the share so claimed which is the subject-matter of the claim, and not the whole of the joint property which is sought to be divided. LAKSHMAN BHATKAR *v.* BABAJI BHATKAR [I. L. R., 8 Bom., 31

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

53. ——— **Possession, Suit for.**—*Suit by auction-purchaser.—Procedure.*—In a suit for possession by an auction-purchaser, where plaintiff valued his claim at what he paid for the property,—*Held* that the valuation was *primâ facie* not incorrect, and, until rebutted by evidence and the result of a proper inquiry, should be accepted as correct. If the valuation was doubted, an inquiry should have been instituted under Act XXVI of 1867. SOOBUDRA *v.* RAM PROKASH SINGH . . **16 W. R., 5**

54. ——— *Suit after foreclosure.—Court Fees Act, s. 7, cl. 9.*—Where a suit for possession is brought after a decree for foreclosure has been obtained, the valuation of such a suit, in so far as the jurisdiction of the Court is concerned, is not to be calculated according to the scale laid down in the Court Fees Act, section 7, clause 9. AHOLLYA BAI DEBIA *v.* SHAMA CHURN BOSE **[1 C. L. R., 473**

55. ——— *Civil Procedure Code, 1859, s. 229, Procedure under.—Fresh suit. —Jurisdiction.*—For the purpose of jurisdiction a claim under section 229 of Act VIII of 1859 is a fresh suit and not a continuation of the suit in which the claim is made: so that where, by reason of a change in the law as to the mode of valuing suits for the purpose of jurisdiction between the date of the original suit and the claim, the Court that dealt with the original suit ceases to have jurisdiction over the subject-matter of the claim, that Court cannot try the claim. MUTTAMMAL *v.* CHINNNAN GOUNDEN . . . . . **I. L. R., 4 Mad., 220**

56. ——— *Suit for possession of share of estate and to set aside deed.*—In a suit for possession of a share of an undivided estate, and to set aside a kobala by which the estate had been illegally alienated, plaintiff is not bound to value his claim according to the price stated in the kobala. AUGOPURA CHOWDHRY *v.* MEAH BIBEE **[10 W. R., 207**

57. ——— *Suit for possession and declaration of title.*—Where a suit is for recovery of possession (with mesne profits) of a certain portion of land, and for a declaration of right in respect of the remainder, its valuation should not include the value of the latter, which is only nominal, and requires a stamp of R10. HURRO NATH BHUTTACHARJEE *v.* HARVEY . . **25 W. R., 23**

58. ——— **Pre-emption, Suit for.**—In a suit for pre-emption, the valuation of the property sued for is to be calculated at the market value for which it would sell, and not at ten times the value of the sudder jumma. ANJUD SINGH *v.* DEPUN SINGH **[3 B. L. R., Ap., 143: 14 W. R., 238, note**

NAUNHOO SINGH *v.* TOFAN SINGH **[14 W. R., 228**

59. ——— *Jurisdiction.—Beng. Civil Courts Act (VI of 1871), s. 20.*—In a pre-emption suit, the subject-matter is the right of

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

Pre-emption, Suit for—*continued.*

pre-emption, the value of which, and not that of the property itself, determines the question of jurisdiction under section 20, Act VI of 1871. NAUN SINGH *v.* RASH BEHARY SINGH . **[I. L. R., 13 Calc., 255**

60. ——— **Redemption, Suit for.**—*Value for purpose of jurisdiction.*—The purchaser of the equity of redemption of certain land sued to redeem the same. He made the mortgagor and vendor of the land a *pro formâ* defendant. *Held* that the value of the subject-matter of the suit was not the market value of the land, but the amount of the mortgage money. KUBAIR SINGH *v.* ATMA RAM **[I. L. R., 5 All., 332**

61. ——— *Mad. Civil Courts Act, 1873, ss. 12 and 14.—Value of improvements.—Per curiam* (TURNER, *C. J.*, and MUTTUSAMI AYYAR, *J.*, dissenting).—Where an instrument of mortgage does not expressly secure the amount to be allowed for improvements on redemption of the mortgage, the value of the improvements is not to be calculated in ascertaining the "value of the subject-matter of the suit" for the purposes of jurisdiction under section 12 of the Madras Civil Courts Act. *Per* TURNER, *C. J.* (MUTTUSAMI AYYAR, *J.*, concurring).—By the custom of Malabar a condition is attached to all kanam demises that the mortgagor shall pay the value of improvements made by the mortgagee during the term of the demise before he can redeem, and the repayment of the sums spent in improvements is thus secured by the mortgage in the same manner as the repayment of the principal advanced, and must be calculated in determining the value of the subject-matter of the suit for the purpose of jurisdiction. ZAMORIN OF CALICUT *v.* NARAYANA . **I. L. R., 5 Mad., 284**

ANONYMOUS CASE **[I. L. R., 5 Mad., 287, note**

62. ——— *Jurisdiction of Munsif.*—The integrity of a joint usufructuary mortgage having been broken in consequence of the mortgagee having purchased the right of several of the mortgagors, one of the mortgagors sued in the Munsif's Court to recover his share of the mortgaged property, alleging that the mortgage had been redeemed. The value of the mortgagee's right, *quâ* such share, was under R1,000. The mortgagee set up as a defence to such suit that a bond, under which a sum exceeding R1,000 was due, had been tacked to the mortgage, and that until such sum had been satisfied the plaintiff could not recover possession of his share. *Held*, on the question whether the Munsif had jurisdiction, that the value of the subject-matter of the suit was the value of the mortgagee's right, *quâ* the plaintiff's share; and as the value of such right did not exceed R1,000 even if it were held that the mortgaged property was further incumbered with such bond, such suit was cognisable in the Munsif's Court. The principle

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

Redemption, Suit for—*continued.*

laid down in *Gobind Singh* v. *Kallu, I. L. R., 2 All., 778*, followed. BAHADUR *v.* NAWAB JAN [I. L. R., 3 All., 822

63. ——— *Joint mortgage.—Jurisdiction.—Court fee.—Valuation of suit.—"Subject-matter in dispute."—Act VII of 1870, s. 7, art. ix.—Act VI of 1871, s. 20.—Statute, Construction of.*—A deed of mortgage was executed by *P.*, *T.*, and *S.* for R4,000. *A.*, the purchaser of the share of *S.*, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees who had purchased the shares of *P.* and *T.*, the other mortgagors. *Held* by the Full Bench with reference to section 7, article ix of the Court Fees Act (VII of 1870), that the defendants-mortgagees having bought up the equity of redemption of two of the mortgagors, and *pro tanto* extinguished their mortgage-debt, and so by their own act empowered the plaintiff to sue for redemption of one third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one third of the original mortgage amount,—namely, R1,333-5-4,—more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject. *Balkrishna Dhondo* v. *Nagvekar, I. L. R., 6 Bom., 324*, referred to. *Held*, also, with reference to the terms of section 20 of the Bengal Civil Courts Act (VI of 1871), that the "subject-matter in dispute" in suits of this kind was the amount of the mortgage-debt and the mortgagee's rights which were sought to be paid off; that from the terms of the plaint it was obvious that in the present case the subject-matter in dispute was R1,333-5-4, the one third of the original mortgage sum of R4,000; and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction. *Per* MAHMOOD, *J.*—It is a rule of construction that while in cases of taxation everything must be strictly construed in favour of the subject, in questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court. Observations by MAHMOOD, *J.*, as to the subject-matter of suits for the redemption of mortgages, and the mode in which the value of such subject-matter should be calculated for purposes of jurisdiction. AMANAT BEGAM *v.* BHAJAN LAL . . . . I. L. R., 8 All., 438

64. ——— *Usufructuary mortgage.—Overvaluation of suit, Effect of.—Jurisdiction.*—The mere fact that a suit has been overvalued does not deprive the Court in which it is brought of jurisdiction, if the overvaluation was *bonâ fide* and had not the effect of altering the appellate jurisdiction,—that is to say, did not cause the appeal from the judgment of the Court of first instance to lie to a different Court from that to which it would have lain had the suit been instituted in a Court having a more limited jurisdiction. RÁJENDRO LALL GOSSAMI *v.* SHAMA CHURN LAHORI . I. L. R., 5 Calc., 188: [4 C. L. R., 417

65. ——— *Suit to redeem mortgaged land paying revenue to Government.*—

VALUATION OF SUITS—*continued.*

1. SUITS—*continued.*

Redemption, Suit for—*continued.*

The stamp duty payable under section B of Act X of 1862, on a suit to redeem mortgaged land paying revenue to Government, should be calculated on the sum for which the land is mortgaged, and not on the market value of such land. NANDRAM SUNDARJI NAIK *v.* BALAJI VITHAL . . 5 Bom., A. C., 153

66. ——— *Suit by kanam-holder against jenmi and holders of prior kanam in possession.*—A suit brought by a kanam-holder against the jenmi and the holders of a prior kanam in possession, to recover possession of the lands, may be properly treated, for the purpose of jurisdiction, as a suit for land, although it results in a decree for redemption, and, if regarded as a redemption suit, would be cognisable by a Court of subordinate jurisdiction. MARAKAR *v.* PARAMESWARAN [I. L. R., 6 Mad., 140

67. ——— **Restitution of conjugal rights, Suit for.**—*Burma Courts Act, 1875, s. 49.—Appeal.*—The proviso in section 49 of the Burma Courts Act amounts to an express declaration that it is a condition precedent to the right of appeal from the Recorder's Court that the suit shall be one which has an amount or value capable of being estimated in money, and that that amount or value must fall within certain specified limits. A suit for the restitution of conjugal rights is incapable of being valued, and no appeal therefore in such a suit will lie under the Burma Courts Act from a decision of the Recorder of Rangoon. GOLAM RAHMAN *v.* FATIMA BIBI [I. L. R., 13 Calc., 232

68. ——— **Sale, Suit to set aside.**—*Sale in execution of decree.—Value of property sold.*—In a suit to set aside an auction sale, the plaint must be stamped as if the suit were for the recovery of the property. DRAPU CHOWDHRY *v.* ISHAN CHUNDER DAS . . . . . 9 C. L. R., 231

69. ——— **Share of land, Suit for.**—*Suit relating to land.—Rental of share.*—In valuing a suit relating to a share of land, the rental of the share is to be the criterion of the stamp. RAM BUKSH THAKOOR *v.* AJOODHYA LAL [2 W. R., Mis., 45

70. ——— **Waste lands, Suit for.**—*Act XXIII of 1863 (Waste Lands), s. 5, Suit under.*—In a suit under section 5, Act XXIII of 1863, by a claimant to waste land proposed to be sold or otherwise dealt with on account of Government, or by an objection to the sale or other disposition of such land, the plaint must be on a stamp of R100. GREESH CHUNDER ROY *v.* COLLECTOR OF SYLHET [7 W. R., 349

2. APPEALS.

71. ——— **Question of valuation.**—*Appellate Court, Power of.—Act XXVI of 1867.*—An Appellate Court has no power to set aside a decision arrived at by the Court of first instance as to the

VALUATION OF SUITS—*continued.*

2. APPEALS—*continued.*

Question of valuation—*continued.*

valuation of the property in suit. MAFIZUDDIN *v.* KARIMUNISSA BIBEE
[6 B. L. R., Ap., 11 : 14 W. R., 381

ISHAN CHANDRA MOOKERJEE *v.* LOKENATH ROY
[6 B. L. R., Ap., 12 : 14 W. R., 451

72. ——— *Jurisdiction.—Appellate Court.*—Where it appears on appeal that the suit has not been rightly valued, and if rightly valued the Court of first instance would not have had jurisdiction to try it, the Appellate Court may entertain the objection, though it had not been raised in the Court below. SHEO GOBIND RAUT *v.* ABHAI NARAIN SINGH . . . 5 B. L. R., Ap., 17

73. ——— Undervaluation.—*Ground for dismissing appeal.—Insufficient stamp.*—Where an appeal was brought on an insufficient stamp, the appeal was dismissed without prejudice to the appellant bringing a fresh appeal within twenty days on a full stamp. WALI ALAM *v.* NASRAN
[3 B. L. R., Ap., 104

S. C. WOLEE ALUM *v.* MISRUN . 12 W. R., 50

74. ——— *Ground for dismissing appeal.*—When a suit has been admitted upon a certain stamp, tried, and decreed for the plaintiff, "undervaluation" is no ground for dismissing the defendant's appeal. EMAMUDDIN KHAN *v.* RAMKISHORE KOWAR . . 5 B. L. R., Ap., 30

75. ——— *Insufficiently-stamped appeal.—Deputy Registrar, Power of.—Civil Procedure Code, 1859, s. 31.*—The Deputy Registrar has no authority to make an order returning a petition of appeal when the stamp fee paid upon is insufficient. The right course for that officer, if his requirements as to stamps are not complied with, is to lay the matter before the Court. But if the appellant is ready to pay what is required, then, whether the time for filing the appeal has expired or not, the Deputy Registrar is bound to receive it if it was originally presented in time. AMBUR ALI *v.* KALI CHAND DOSS . . . 24 W. R., 258

76. ——— Overvaluation.—*Refund of stamp duty.*—Where excess stamps had been filed in consequence of an overvaluation of the appeal, the surplus amount was ordered to be refunded. IN THE MATTER OF GRANT . . . 14 W. R., 47

77. ——— Law applicable to valuation.—*Law in force at presentation of appeal.*—The valuation of an appeal must be according to the Act in force at the time of its presentation, and the original valuation under a law obsolete at the period of appeal can have no influence in the decision. ANONYMOUS . . . . 5 Mad., Ap., 44

BHUGOBUTTY KOOER *v.* KUSTOOREE KOOER
[15 W. R., 272

78. ——— *Civil Procedure Code, 1859, s. 229.—Change of law between date of*

VALUATION OF SUITS—*continued.*

2. APPEALS—*continued.*

Law applicable to valuation—*continued.*

original suit and date of claim, Effect of, on jurisdiction.—The subject-matter of an appeal should be valued for the purpose of jurisdiction according to the law in force at the date of the appeal, and not of the suit which has led to it. For the purpose of jurisdiction, a claim under section 229 of Act VIII of 1859 is a fresh suit, and not a continuation of the suit in which the claim is made; so that where, by reason of a change in the law as to the mode of valuing suits for the purpose of jurisdiction between the date of the original suit and the claim, the Court that dealt with the original suit ceases to have jurisdiction over the subject-matter of the claim, that Court cannot try the claim. MUTTUMMAL *v.* CHINNANA GOUNDEN . . . I. L. R., 4 Mad., 220

79. ——— Computation of value.—*Valuation of appeal for jurisdiction.—Mad. Act III of 1873 (Madras Civil Courts Act).*—According to section 13 of Act III of 1873 (the Madras Civil Courts Act), it is the money value of the original suit that fixes the jurisdiction throughout the subsequent litigation in its several stages. *Held*, therefore, where the amount of the original suit was more than ₹5,000, and an appeal was preferred to the District Court, but the amount in dispute in the appeal did not exceed ₹5,000, that the District Court had no jurisdiction to hear the appeal. MUTHUSAMI PILLAI *v.* MUTHU CHIDAMBARA CHETTI
[7 Mad., 356

80. ——— Appeals in measurement cases.—*Miscellaneous petitions.*—Petitions of appeal in cases to obtain an order for measurement may be written on the stamp used for miscellaneous petitions. SMITH *v.* NUNDUN LAL
[6 W. R., Act X, 13

81. ——— *Right to measure valued at specified amount.*—Where a zemindar values his right to measure at a certain amount, the petition of appeal must be written on a regular stamp according to such valuation, and not upon a stamp used for miscellaneous petitions. OOMA CHURN BISWAS *v.* SHIBNATH BAGCHEE . 8 W. R., 14

82. ——— Appeal from order declaring party to have no locus standi.—*Miscellaneous appeal.—Petition.*—An appeal from an order of the lower Appellate Court, declaring that a party who claimed to be in possession of property taken in execution of a decree to which he was no party, and with which he had no concern, had no *locus standi* in the execution case, is in the nature of a miscellaneous appeal, and should be on a stamp for an ordinary petition. MOHESH CHUNDER BANERJEE *v.* CHUNDER MONEE DABEE . 9 W. R., 139

83. ——— Appeal from order rejecting application to set aside ex parte decision.—*Summary appeal.*—The stamp required for a petition of appeal from an order rejecting an application to set aside an *ex parte* decision under section

VALUATION OF SUITS—*continued.*

2. APPEALS—*continued.*

Appeal from order rejecting application to set aside ex parte decision—*continued.*

119, Act VIII of 1859, was a two-rupee stamp. Such an appeal was treated as a summary and not a regular appeal. PARBUTTY *v.* GREEDHAREE LALL [4 W. R., Mis., 15

84. ——— Appeal from order rejecting plaint for misjoinder.—*Miscellaneous appeal.—Stamp.*—An appeal from an order rejecting a plaint for misjoinder is a miscellaneous appeal; and if it is rejected, an appeal from the order of rejection is also of the nature of a miscellaneous appeal, and is to be valued and stamped as such. KOSSELLA KOER *v.* BEHAREE PATUCK . . . 12 W. R., 70

85. ——— Appeal by mortgagee on question of lien.—Where the appeal by the mortgagee was not with reference to the property, but to a mortgage lien,—*Held* that the valuation for the purpose of stamp in such appeals should be with reference to the value of the lien for the mortgage-debt of incumbrance, and not with reference to the value of the mortgaged property. MAHOMED SHEERUN KHAN *v.* MISSER KOONDUN LALL. BHEEKA *v.* NUND KISHORE. [Agra, F. B., 158 : Ed. 1874, 119

86. ——— Appeal in suit for profits in respect of several years.—*Court fees.—Distinct causes of action.—Distinct subjects.—Act VII of 1870 (Court Fees Act), s. 17.—Civil Procedure Code, ss. 43, 44.*—In an appeal in a suit for recovery of profits under section 93 (*h*) of the N.-W. P. Rent Act in respect of several years, the proper court fee leviable on the memorandum of appeal is one calculated on the aggregate amount of the profits claimed, and not one calculated separately on the amount of profits claimed for each year MUHAMMAD MALIK KHAN *v.* NIRHAI BIBI [I. L. R., 7 All., 761

87. ——— Appeal from rejection of claim by forest settlement officer.—*Mad. Forest Act (V of 1882), s. 10.—Appeal to the District Court.—Court Fees Act, sch. II, art. 11 (a); art. 17, cl. vi.*—An appeal to the District Court from the rejection of a claim by a forest settlement officer under clause 2 of section 10 of the Madras Forest Act, 1882, falls under article 17, clause VI, and not under article 11 (*a*) of schedule II of the Court Fees Act, 1870. KAMARAJA *v.* SECRETARY OF STATE FOR INDIA . . I. L. R., 8 Mad., 22

88. ——— Appeal from order disallowing an application to file an agreement to refer to arbitration.—*Court fee, Mode of calculation of.—Per* OLDFIELD, *J.*—The court fee payable on a memorandum of appeal from an order under section 523 of the Civil Procedure Code, disallowing an application to file an agreement to refer to arbitration, is an *ad valorem* fee computed on the value of the subject matter in dispute in the appeal. DAYA NAND *v.* BAKHTAWAR SINGH [I. L. R., 5 All., 333

VALUATION OF SUITS—*continued.*

2. APPEALS—*continued.*

89. ——— Appeal from order disposing of dispute under Civil Procedure Code, s. 322B.—*Dispute as to extent of judgment-debtor's liability to claim.—Nature of appeal.—Court Fees Act, VII of 1870, sch. II, No. 11.*—An appeal from the decision of a dispute under section 322B of the Civil Procedure Code falls directly within the exception of article 11, schedule II of the Court Fees Act (VII of 1870), and the memorandum of appeal should therefore be presented as for a decree in a suit upon an *ad valorem* stamp. *Srinivasa Ayyangar* v. *Pria Tambi Nayakar, I. L. R., 4 Mad., 420,* dissented from. AHMAD KHAN *v.* MADHO DAS . . . I. L. R., 7 All., 565

90. ——— Appeal in partition suit.—*Court Fees Act, sch. II, art. 17, cl. 6.—Stamp on memorandum of appeal in partition suit.*—The stamp fee payable on appeals to the High Court in suits asking for "partition, the separation of a share, and for khas possession of that share after separation," is that leviable under article VI, clause 17, schedule II of the Court Fees Act. For the purpose of jurisdiction the Court should be guided by the value of the property in suit, but the amount of the stamp fee should be governed by a different principle. KIRTY CHURN MITTER *v.* AUNATH NATH DEB . I. L. R., 8 Calc., 757 : 11 C. L. R., 95

91. ——— Appeal from decree for possession disallowing perpetual character of leases.—A suit for possession of certain lands having been decreed on the ground of plaintiff's right of occupancy, but the perpetual (mirasi) character of the leases under which the claim had been made having been disallowed, an appeal was preferred to have it declared that the leases were perpetual. *Held* that, as the value of the claim would be the difference in the value of the land as held under a mirasi tenure at a fixed rent, or an ordinary tenure at a fluctuating rent, and as this might be an extremely difficult calculation, the stamp fee upon the appeal would be properly fixed according to the valuation put by the appellant upon the subject-matter of his claim. KEBUL RAM MUNDUL *v.* WELLS . . . . 24 W. R., 454

92. ——— Appeal in suit to enforce a right of pre-emption.—*Appeal by purchaser.—Court fee.—Act VII of 1870 (Court Fees Act), s. 7, (i) and (vi).*—Where, in a suit to enforce a right of pre-emption, a decree was passed against the vendees-defendants, and they appealed from the same on the grounds that they were entitled to receive from the plaintiffs-pre-emptors a sum larger than that found by the Court of first instance to have been the purchase-money, and also that the plaintiffs had estopped themselves from asserting the right by refusing to purchase,—*Held* that the nature of the suit was not changed in appeal, and that, on the contrary, the subject-matter of the dispute between the parties was the right of pre-emption, the value of which, for the purposes of court fee, was to be determined in manner directed by section

VALUATION OF SUITS—*continued.*

2. APPEALS—*continued.*

Appeal in suit to enforce a right of pre-emption—*continued.*

7, clause (*vi*) of the Court Fees Act, VII of 1870. *Ram Lakhan Rai* v. *Bandan Rai* distinguished. Where an appeal is preferred in a suit for pre-emption, on the ground that the right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute, for the purposes of the Court Fees Act, must be determined as in terms provided in article (*vi*) of section 7 of the Act. Where the question in appeal relates solely to the amount to be paid by the pre-emptor, the court fee should be calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and the other. HAFIZ AHMAD *v.* SOBHA RAM . . . . I. L. R., 6 All., 488

93. ——— **Appeal in suit for redemption of usufructuary mortgage.**—*Beng. Civil Courts Act (VI of 1871), s. 22.*—The plaintiffs sued for the possession of certain immoveable property, alleging that they had mortgaged such property to the defendants, and that the mortgage-debt had been satisfied out of the profits of the property. The defendants set up a defence to the suit which raised the question of the proprietary right of the plaintiffs to the property. The value of the mortgagees' interests in the property was below R5,000; the value of the mortgaged property exceeded that amount. On appeal to the High Court from the original decree of the Subordinate Judge in the suit, it was contended that the appeal from that decree lay to the District Court and not to the High Court. *Held* that the "subject-matter in dispute," within the meaning of section 22 of VI of 1871, was the mortgage and the mortgagees' rights under it, and that, the value of this being only R2,000, the appeal should have been preferred to the District Court. Second Appeal No. 1039 of 1877 dissented from. GOBIND SINGH *v.* KALLU [I. L. R., 2 All., 778

VALUE OF PROPERTY, STATEMENT IN WILL AS TO—

See EVIDENCE—CIVIL CASES—RECITALS IN DOCUMENTS . I. L. R., 1 Bom., 561

VARIANCE BETWEEN BOUGHT AND SOLD NOTES.

See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS . . 9 B. L. R., 245

VARIANCE BETWEEN PLEADING AND PROOF.

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See CASES UNDER ESTOPPEL—ESTOPPEL BY DEEDS AND OTHER DOCUMENTS.

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

See CASES UNDER ISSUES—FRESH OR ADDITIONAL ISSUES.

See TITLE—EVIDENCE AND PROOF OF TITLE—LONG POSSESSION. [I. L. R., 2 Calc., 418

See WRITTEN STATEMENT. [I. L. R., 1 Bom., 209

1. GENERAL CASES.

1. ——— **Decision on point not raised in pleadings or issues.**—A plaintiff must recover *secumdum allegata et probata*, and no decree should be given in his favour on a point not raised in the pleadings nor embodied in an issue. JOYTARA DASSEE *v.* MAHOMED MOBARUCK [I. L. R., 8 Calc., 975: 11 C. L. R., 399

JANKEE *v.* JHANJOO . . 2 N. W., 407

MOOKTAKESHEE DEBEA *v.* COLLECTOR OF BURDWAN . . . . . 12 W. R., 204

TARA CHAND ROY *v.* NOBIN CHUNDER ROY [21 W. R., 132

PROTAP CHUNDER BOROOAH *v.* COLLECTOR OF GOWALPARA . . . 22 W. R., 216

2. ——— **Amendment of case.**—*Mistake or misapprehension.*—A plaintiff can be allowed to amend his case only when he has an honest case, but either through mistake or some misapprehension he has not placed the real facts before the Court. BHYRO DUTT *v.* LEKHRANEE KOOER [16 W. R., 123

3. ——— *Civil Procedure Code, 1859, Operation of, as compared with old procedure in equity.*—Under the Civil Procedure Code parties are not bound so strictly to the pleadings as in an equity suit under the old procedure, if their being so bound would work injustice. DOSSEE *v.* TARRACHURN COONDOO CHOWDHRY [Bourke, A. O. C., 48

4. ——— **Variance in plaint.**—*Dismissal of suit, Ground for.—Held* by a majority that the Code of Civil Procedure does not require the dismissal of a suit by reason of any variance in the plaint. MAHOMED REEZAOODEEN *v.* HOSSEIN BUKSH KHAN . . . . . 1 W. R., 300

5. ——— **Raising issues after variance is shown.**—A plaintiff will not be allowed to set up one case, and, having proved another, to ask for issues to be raised to suit the proof; but when a plaint and its proof necessarily lead to one or more particular issues, it is the duty of the Court, if these issues do not come by surprise on the defendant, to raise such issues, and to give the relief thereon to which the plaintiff is entitled. OBHOYCHURN MULLICK *v.* WOOMES CHUNDER PAUL . 2 Hyde, 263

6. ——— **Proof of cause of action not alleged.**—*Dismissal of suit, Ground for.—Claim on one cause of action, evidence showing another.*—

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

1. GENERAL CASES—*continued.*

Proof of cause of action not alleged—*continued.*

Where a plaintiff sues on one cause of action and in support thereof gives evidence which, if it establishes anything, establishes a different cause of action, the Court acts properly in dismissing his suit. MUDHOOSOODUN GOSSAMEE *v.* HILLS . 10 W. R., 242

7. ——— Amount proved exceeding amount claimed.—*Decree.*—Where the amount to which the plaintiff would be entitled on the evidence exceeds that specified in the plaint, plaintiff is restricted to the amount so specified. NATHOORAM *v.* JARDINE, SKINNER & CO. . . Cor., 118

8. ——— Presumption from failure to prove allegations.—*Onus of proof.*—An adversary is entitled to the benefit of such presumptions as naturally arise from a party's failure to prove his allegations, even though the onus was in the first instance on the former. GUNEE BISWAS *v.* SREE GOPAL PAUL CHOWDHRY . . . 8 W. R., 395

9. ——— Failure to prove precise case pleaded.—*Decree, Right to.*—A previous ruling in *Beejoynath Chatterjee* v. *Lukhee Monee Dabee, 12 W. R., 248,* explained not to mean that a plaintiff must either get the thing he claims or nothing at all, but that having come into Court upon one title, which he asks to have declared and fails to prove, a plaintiff cannot claim the declaration of another. GOLUCK CHUNDER SIRCAR *v.* ISHAN CHUNDER DEB . . . 23 W. R., 437

10. ——— Right to make party liable in different character.—*Suit against party personally.—Representative's liability.*—In a suit to recover advances made to the defendant to carry on an indigo factory under a karbarnamah, in which it was agreed that the advance should first be repaid out of the profits realised from the manufacture, where it was found that the sale of the indigo had yielded more than the amount advanced, but had been credited by the plaintiff to old debts owing him by the defendant's father instead of to the defendant's personal debt,—*Held* that the plaintiff had violated the terms of the agreement, and had not in good faith attempted to make the defendant personally liable, and he could not be allowed to proceed against the defendant as representative of his father. PEREOUX *v.* LUCHMEEPUT SINGH . . 12 W. R., 113

11. ——— Unestablished defence.—*Decree, Right to.*—The Court should not necessarily decree the plaintiff's claim in full because the defence set up by defendant has entirely failed. MUTLOOB ALI *v.* KIRIA . . 1 Agra, 276

12. ——— Defence not set up by defendant.—*Inconsistent defence.*—It is not competent to a Court to set up a defence not only not made by the defendant, but inconsistent with his own statement. SHURUT SOONDUREE DABEE *v.* PURESH NARAIN ROY . . 13 W. R., 464

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

1. GENERAL CASES—*continued.*

Defence not set up by defendant—*continued.*

RADHA BINODE DUTT *v.* KOOTABODE MUNDUL [15 W. R., 363

CHITTRA COOMARY BEBEE *v.* RAM LALL MOOKERJEE . . . . 18 W. R., 334

RAJARAM BANERJEE *v.* SONATUN ROY [23 W. R., 404

2. SPECIAL CASES.

13. ——— Account, Suit for balance of.—*Failure to prove balance alleged.—Issues.—Civil Procedure Code, 1859, s. 141.*—*Held,* in contravention of various rulings of the late Sudder Court, that a suit brought on an alleged settlement of accounts, and balance struck and admitted, should not be dismissed merely on account of the plaintiff's failing to prove the alleged settlement and admission of balance by defendant; but that the Court, being competent under section 141 of the Civil Procedure Code to amend or frame additional issues that may be necessary to determine the real question or controversy between the parties, ought to enter into evidence regarding the items composing the account, and decree the claim regarding such items, if they are found to be due and not otherwise barred. KISHUN PERSHAD *v.* BHAWANEE DEEN [Agra, F. B., 47 : Ed. 1874, 35

RAMSAHOY *v.* SEETHOO [1 N. W., 28 : Ed. 1873, 26

But where the issues had been framed solely on the alleged adjustment, the suit was held to be rightly dismissed. NOBIN CHUNDER KOONDOO *v.* SREEDHUR BHUTTACHARJEE . . 15 W. R., 24

14. ——— Alienation, Suit to set aside.—*Variance between case in plaint and evidence.—Raising ground not taken in plaint.*—The plaintiff, a Hindu, sued to set aside a certain alienation, on the ground that the alienor was an illegitimate son of the plaintiff's grandfather, and therefore had no interest in the property. Not being able to substantiate this ground in the first Court, the plaintiff, on appeal, raised a new ground,—*viz.*, that the alienation was bad, because, under the Mitakshara law, the owner of a share in a joint ancestral estate is not competent to alienate his share without the consent of the other heirs. *Held* that such variance could not be allowed, and that the plaintiff must prove his case as laid in the plaint. SRI PRASAD *v.* RAJ GURU TRIAMBUKNATH DEO [6 B. L. R., 555 : 14 W. R., 386

15. ——— *Failure to prove case.—Raising fresh case on appeal.*—In a suit to set aside a sale of ancestral property by a minor's father and guardian as made without necessity and for the father's profligate expenditure, and without inquiry by the purchasers as to whether it was for the infant's benefit, the defendants alleged that the sale was made under pressure of a foreclosure suit on account of a demand under a former mortgage

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Alienation, Suit to set aside—*continued.*

for an ancestral debt. Plaintiff having failed to establish his case, sought to go back and open the consideration for the mortgage made so long as twenty years ago, but the Privy Council, agreeing with the High Court, refused to allow him to do so. HUMEEDA *alias* KHAJOO *v.* AMATOOL MEHDEE BEGUM . . . . **17 W. R., P. C., 106**

16. ——— **Company.**—*Contributories, List of.—Amendment of plaint.*—Where the holder of shares in a company was described in the list of contributories, against whom a balance order by the Court of Chancery had been made, as "Devji Bhanji, cotton merchant," and as being sued "in his own right," —*Held* that the plaintiffs' company could not be allowed to give evidence that the shares were in fact held by a firm consisting of two individuals named respectively Bhanji Zutani and Devji Hemraj; nor could the plaintiffs be allowed, at the hearing of the appeal, to amend their plaint, originally framed against both partners, with a view to making the firm liable for the amount of the calls, so as to sue Bhanji Zutani only, who alone was alleged to have signed the articles and memorandum of association in the name of Devji Bhanji, and to make him personally liable as the holder of the shares. *Weikersheim's case, L. R., 8 Ch., Ap., 831,* distinguished. LONDON, BOMBAY, AND MEDITERRANEAN BANK, *v.* BHANJI ZUTANI . **I. L. R., 2 Bom., 116**

17. ——— **Compromise.**—*Failure to prove case.—Right to succeed on ground not alleged.*—Where the plaintiff sued to have a deed of compromise set aside as having been fraudulently entered into behind his back and without his knowledge, and failed to prove any fraud or collusion,—*Held* that he was not entitled to a decree on the ground taken on appeal, that the document was invalid as being unregistered, declaring that it did not affect his interests. MADHUB ALI KHAN *v.* HOSSAIN REZA KHAN . . . . . **4 C. L. R., 52**

18. ——— **Contract.**—*Assumption of facts, Decision on.*—The determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. Therefore, where the relief sought by the plaint is grounded on a contract, the case must not be determined upon an alleged equity resulting from a different state of facts and inconsistent with that alleged by the plaintiff. ESHAN CHUNDER SINGH *v.* SHAMACHURN BHUTTO

[2 Ind. Jur., N. S., 87: 6 W. R., P. C., 57 11 Moore's I. A., 7

Followed in DOSS RAM DOSS *v.* MOHENDRO ROY DECHA . . . . **18 W. R., 274**

19. ——— *Issues.—Amendment of plaint.—Variance between case in plaint and evidence.*—The plaintiffs sued the defendants for damages for breach of contract, alleging in their plaint that they had agreed to sell, and the defendants to purchase, certain indigo seed, but that the defendants had refused to take delivery, although the plaintiffs were ready and willing to deliver the same. Upon the evidence of the plaintiffs, it appeared that there was no contract as alleged in the plaint, but the contract, as stated by them, was that they (the plaintiffs) were to purchase seeds as agents for the defendants. The Judge dismissed the suit on the ground that the plaintiffs were bound to prove their case as stated in the plaint. *Held* that that the suit ought not to have been dismissed on that ground. The issues raised admitted of the true question being tried,—*viz.*, whether, under the circumstances, the defendants were liable to pay the price of the seed; and if they did not, the Court ought to have amended the issues, or framed additional ones. The object of the plaint is merely to bring the matter in dispute before the Court, but it is for the Court, upon the statements before it, to determine the real issue between the parties. ARBUTHNOT *v.* BETTS . . **6 B. L. R., 273: 14 W. R., 181**

20. ——— **Ejectment, Suit for.**—*Failure to prove lease.—Reliance on general title, Right of.—Case stated in plaint.*—Where a lessor sues to eject his tenant on the expiration of the latter's term, or for breach of the conditions of his lease, and fails to prove the lease, he is not ordinarily at liberty in the same suit, ignoring the lease, to fall back upon his general title as though he had not set up and failed to prove the alleged lease. A plaintiff must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case in his plaint from the commencement, as the defendant then will know that he has more than one case to meet, and will not be taken by surprise. LAKSHMIBAI *v.* HARI BIN RAVJI . . . **9 Bom., 1**

21. ——— **Fraud.**—*Failure to prove specific case of fraud.*—Where the plaintiff in his pleadings pledged himself to prove a specific case of fraud, and made his cause of action entirely dependent on that, he was not allowed to succeed, when he failed to prove fraud, on a collateral matter. SAHEB ROY *v.* GUJADHUR PERSHAD NARAIN SINGH

[22 W. R., 221

22. ——— **Mortgage.**—*Suit for redemption.—Decree on mortgage set up by defendants and not on that alleged by plaintiff.*—In a suit to redeem, the plaintiff produced a mortgage the genuineness of which the defendants denied, but they produced a mortgage from the plaintiff's ancestors to their ancestors. The Principal Sudder Ameen made a decree for the restoration of the lands according to the terms of the mortgage produced by the defendants. The Civil Judge reversed the decision. *Held,* on special appeal, that the Principal Sudder Ameen was justified in making the decree which he gave, it not being inconsistent with the relief prayed for by the plaint. UNICHA KANDYIB KUNHI KUTTI NAIR *v.* VALIA PIDIGAIL KUNHAMED KUTTI MARACCAR

[4 Mad., 359

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Mortgage—*continued.*

23. ——————— *Suit for redemption.—Evidence given of other mortgage than the mortgage in respect of which suit brought.—Evidence Act, I of 1872, s. 35.—Statement of a survey officer as to entry as occupant how far admissible.*—The plaintiff sued to redeem certain lands alleged to have been mortgaged by his ancestor to the ancestors of the defendants in 1823. At the hearing the deed of mortgage, in respect of which the suit was brought, was produced, but another mortgage of about the same date was produced and proved by the plaintiff. The lower Courts passed a decree for the plaintiff. The defendants appealed. *Held* (reversing the decree of the lower Courts) that where a particular instrument is sued on as the basis of a right, it is incumbent on the plaintiff to establish his case on that particular cause of action, not on a cause of action merely bearing the same common name, or of the same description, and so included in the same class. Under section 35 of the Evidence Act, I of 1872, a statement by the survey officer that the name of this or that person was entered as occupant would be admissible if relevant, but it would not be admissible to prove the reasons for such an entry as facts in another case. GOVINDRAV DESHMUKH *v.* RAGHO DESHMUKH [I. L. R., 8 Bom., 543

24. ——————— *Change of nature of suit.*—The plaintiff sued to redeem a mortgage, alleging that it was made in the year A.D. 1821 for R25. The defendant admitted the mortgage, but alleged that it was made in A.D. 1791 for R110, and contended that the suit was barred by limitation. The Subordinate Judge held that the mortgage had been made for the amount and at the date alleged by the defendant, but that the suit was not time-barred, as the mortgagor's title had been acknowledged by the mortgagee within the period of limitation. He accordingly made a decree for redemption on terms consistent with the plea of the defendant, but opposed to that of the plaintiff. On appeal, the Assistant Judge agreed with the first Court as to the merits of the case, but reversed its decree on the ground that the plaintiff was not entitled to succeed on a state of facts inconsistent with the case set forth in the plaint, observing that a plaintiff ought not to be allowed to change his cause of action. *Held* by the High Court, on second appeal, that the decree made by the first Court in favour of the plaintiff did not in any way proceed upon a cause of action different from that made in the plaint, and that the cause of action remained the same,—namely, the right of the mortgagor to redeem from a mortgagee. A plaintiff ought not to be allowed to alter his case so as to convert a suit of one character into a suit of another and inconsistent character. LAKSHMAN BHISAJEE *v.* HARI DINKAR DESAI . I. L. R., 4 Bom., 584

25. ——————— *Alteration of case from that made in plaint.*—Upon a mortgage of land made little less than sixty years before the present suit, a decree followed in 1825 to the effect that an account having been taken of what was due on the mortgage, the mortgagor might at any time make a tender of such mortgage-money with interest up to date, and require that the land should be restored. The plaintiff, representing the interest of the original mortgagor, sued for redemption of the mortgage, treating the above decree as regulating the rights of the parties from the time when it was made. *Held* that the plaintiff not having sought by his plaint to redeem the mortgage, or alleged that there had been acknowledgment, could not in the present appeal fall back on a right to redeem such mortgage, although the latter might be within limitation, as that would be to make a case different from the one tried and decided in the Courts below. Accordingly, the suit had been properly dismissed. HARI RAVJI CHIPLUNKAR *v.* SHAPURJI HORMASJI SHET [I. L. R., 10 Bom., 461

26. ——————— *Suit for redemption of immoveable property brought as donee.—Title of plaintiff as reversioner.*—In a suit for the redemption of immoveable property brought by the plaintiff as donee from a Hindu widow of the equity of redemption, the plaintiff's right to the property as reversioner cannot be inquired into, notwithstanding an allegation in the plaint that he was a near relative of the husband of the donor. JAGANNATH VITHAL *v.* APAJI VISHNU . 5 Bom., A. C., 217

27. ——————— *Procedure.*—Where a mortgagor sues to recover possession of the mortgaged property on the ground that the loan has been paid off from the assets of the estate, and that he is entitled to recover surplus collections, and the Court finds that a large balance in favour of the mortgagee still exists, the plaintiff is not entitled to a conditional decree, but the suit should be dismissed: KUNDUN LAL *v.* SASTA KOOER. SASTA KOOER *v.* KUNDUN LAL. . . . . 8 W. R., 369

But *see* BOISTUB DOSS KOONDOO *v.* HURO NARAIN HALDAR . . . 17 W. R., 408

28. ——————— *Usufructuary mortgage.—Failure of claim to enforce lien.—Compensation for breach of contract to give mortgagee possession.*—A usufructuary mortgagee, the mortgagor having broken his agreement to give him possession of the mortgaged property, sued the mortgagor to recover the principal mortgage-money and interest by enforcement of lien. The property was not hypothecated as security for the mortgage-money. *Held* that it was inequitable to dismiss the suit for that reason, the defendant having been guilty of a breach of the contract of mortgage, for which the plaintiff was entitled to compensation; that although the plaintiff did not expressly claim such relief, yet, regard being had to the pleadings and evidence in the case, the suit might be treated as one for such relief; and that on estimating the compensation which should be awarded, the principal mortgage-

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Mortgage—*continued.*

money with interest at the rate specified in the contract of mortgage might fairly be taken as a reasonable guide. MAHESH SINGH *v.* CHAUHARIA SINGH [I. L. R., 4 All., 245

29. ——— *Usufructuary mortgage.—Suit to enforce hypothecation.—Compensation for breach of contract.—Money lent.—Money had and received for plaintiff's use.*—An instrument of mortgage provided that the mortgagors should deliver possession of the mortgaged property to the mortgagee, and the latter should retain possession, setting off profits against interest, until the former should redeem, by payment of the principal sum, which they were at liberty to do in the month of Jaith in any year they pleased. The mortgagors having failed to deliver possession of the mortgaged property, the mortgagee sued them for the principal sum and interest, asking for enforcement of lien. The instrument of mortgage did not contain any hypothecation of the property. *Held* that, although the suit, so far as it sought enforcement of lien, wholly failed, there being no hypothecation of the property, yet it was not equitable or proper that, as regards the money-claim, the mortgagee should be relegated to a fresh suit, inasmuch as a cause of action was disclosed, whether the suit was regarded as one for compensation in damages for breach of contract, or for money had and received for the plaintiff's use, or for money lent, and the suit should be determined on its merits. SHEO NARAIN *v.* JAI GOBIND [I. L. R., 4 All., 281

30. ——— Partition.—*Failure of suit.—Right to declaration of share.*—Where the main object of a suit framed and valued as a suit for partition of a portion of the estate fails, the plaintiff is not entitled to turn round and ask for a declaration as to the extent of his share. RUTTUN MONEE DUTT *v.* BROJO MOHUN DUTT . . 22 W. R., 333

Affirming S. C. . . . 22 W. R., 11

31. ——— Possession.—*Moveable property.—Making different case on appeal.*—In a suit for delivery over to plaintiff of papers said to be in the possession of defendant, the answer of the latter was that he had made over the papers to the plaintiff's son. This plea was put in issue in the first Court, which found that some papers had been delivered as alleged, and made a decree ordering the delivery of certain other of the papers. On appeal, the attention of the Judge was principally directed to the point whether the receipt of the papers by the plaintiff's son was a receipt by him as plaintiff's agent. *Held* that this point was a departure wholly from the case made below, and ought not to have been entertained on appeal. PUNCHANUN ROY *v.* TROYLUCKHOMOHINEE DOSSEE . . . . 14 W. R., 466

32. ——— *Immoveable property.—Separate acquisition.—Held* that the question of possession was not a proper one for decision when a plea of limitation was overruled, and the claim was found to be based, not on the fact of possession, but of the claimant being a member of the joint family and the property acquired by joint funds. NUND RAM *v.* CHOOTOO . . 1 Agra, 255

33. ——— Possession, Suit for.—*Accrual of cause of action.—Limitation.*—In a suit by an execution-purchaser to recover possession of landed property, where defendant pleads limitation and plaintiff proves facts from which the Court is unable to draw conclusions of law for itself, plaintiff ought not to be strictly bound to the accrual of the cause of action alleged in his plaint, so long as that arose within twelve years before commencement of the suit. MARIAM BEGUM *v.* RYE CHURN DUTT [13 W. R., 269

34. ——— *Misdescription as to situation of lands.—Identification.*—Where lands claimed under a certificate of sale as being in one village are found to be in another, it is open to the plaintiff to show that there has been a misdescription, and that, although the name of the former was used, the intention was to convey the lands he claimed situate in the latter. RAMGOPAL BARICK *v.* SHIB PERSHAD SIRCAR . . 12 W. R., 483

35. ——— *Failure to prove pottah.*—In a suit for possession by two ryots claiming under different pottahs from the same zemindar, when the defendant's pottah fails, he still has a right to have a judicial determination of his claim to occupancy. BYDNATH SHAHA *v.* JADUB CHUNDER SHAHA . . . . . 3 W. R., 208

36. ——— *Suit for possession on specific title.—Right of occupancy.*—A plaintiff who succeeds in proving the facts stated in his plaint as necessarily implying a right of occupancy, may succeed in a suit for possession even though he does not prove the title on which he specifically relied. SURJOO PERSHAD *v.* KASHEE RAWUT [21 W. R., 121

37. ——— *Decree on ground not alleged in plaint.*—The plaintiff sued for a declaration of mirasi mokurrari rights to certain lands and for mesne profits, alleging that he had been wrongfully ejected by the predecessors in title of the defendants. *Held* that the lower Courts were wrong in giving the plaintiff a decree for possession on the ground of occupancy right, he not having claimed such relief in his plaint. *Bijoya Debia* v. *Bydonath Deb, 24 W. R., 444,* followed. BRINDABUN CHUNDER SIRKAR *v.* DHUNUNJOY NUSHKUR [I. L. R., 5 Calc., 246 : 4 C. L. R., 443

38. ——— *Defendant sued as a trespasser.—Right to decree against him as a tenant.*—Where a plaintiff brings a suit for possession, alleging that the defendant is a trespasser, the

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Possession, Suit for—*continued.*

moment it is shown that the defendant is not in possession as a trespasser, but holds as a tenant under the plaintiff, the suit must be dismissed, no matter what the character of that tenancy may be. RAM GOLAM SINGH *v.* HEET NARAIN SAHOO [2 C. L. R., 292

39. ——— *Failure to prove allegation of defendant's tenancy.—Right to treat him as a trespasser.*—Where a plaintiff sued for khas possession on the ground that the defendant was his tenant and had forfeited his tenure by denying his landlord's title, and it was found there was no relation of landlord and tenant between the parties, the plaintiff was held not entitled to succeed on the contention that the defendant was a trespasser. LALJEE SINGH *v.* BUNWARY LALL ROY [25 W. R., 448

40. ——— *Failure to prove permanent character of tenancy.—Right to decree as tenants.*—In a suit for possession of land on the strength of an alleged mirasi mokurrari, one of the main issues was whether the plaintiffs were or were not tenants of the land in dispute, and upon this issue it was found that the plaintiffs had acquired a title as tenants from long possession, although they failed to establish the mirasi mokurrari character of their tenure. *Held* that the plaintiffs were entitled to a decree for possession. *Kalee Coomar Pattur* v. *Khettur Nath Baug, 17 W. R. 47;* and *Surjoo Pershad* v. *Kashee Rawut, 21 W. R., 121,* followed. *Bijoya Debia* v. *Bydonath Deb, 24 W. R., 444;* and *Brindabun Chunder Sircar* v. *Dhananjoy Luskur, I. L. R., 5 Calc., 246 : 4 C. L. R., 443,* distinguished. SHIB CHUND LAHIRI *v.* JOYMALA DASI . . . 7 C. L. R., 103

41. ——— *Suit on ground of forcible dispossession where defendant's possession is found to be permissive.*—A suit to recover possession of land on the ground of forcible dispossession, in which it was pleaded by defendant and found as a fact that the defendant's holding was of a permissive character, should be dismissed at once, the defendant's possession not being a wrongful one of the kind alleged by plaintiff. The right mode of action in such a case would have been for plaintiff to serve the defendant with notice to quit the land, and thereby put an end to the permission relied upon by him. PHILLIPS *v.* NUNDCOOMAR BANERJEE [8 W. R., 385

42. ——— A plaintiff's failure to prove dispossession on the particular date mentioned in the plaint is not a sufficient ground for the dismissal of the suit. HUKO CHUNDER CHOWDHRY *v.* GOBIND CHUNDER MOITRO [15 W. R., 178

BOGA KOLITA *v.* THOOLESSUR KAYASTA [24 W. R., 357

TORAB ALI *v.* MAHOMED AMEER HOSSEIN [3 C. L. R., 105

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Possession, Suit for—*continued.*

43. ——— *Suit for confirmation of possession.—Proof that plaintiff was out of possession.—Change in form of suit.*—The plaintiff sued for an adjudication of his right to, and confirmation of possession of, certain lands, on the allegation that they had been conveyed to him by one of the defendants and that he was in actual possession thereof, and that his title thereto had been impeached by the subsequent sale of the same lands by his vendor to the other defendant. The Court of first instance found that the plaintiff's allegation of possession was *false*, and dismissed the suit. *Held*, on appeal, that the suit was rightly dismissed, for though a plaintiff who brings forward a *bonâ fide* case, which he proves in substance, though not in form, would be assisted by the Court, in the absence of such special circumstances no such assistance would be afforded. TERIETPUT SINGH *v.* GOSSAIN SUDERSAN DAS . I. L. R., 4 Calc., 46

44. ——— *Failure to prove case in plaint.—Right to decree on other grounds.*—At a sale held under Bengal Act VIII of 1865, the defendant purchased a shikmi tenure, and obtained possession thereof. Subsequently he ousted the plaintiff from certain lands, and hence the suit by the plaintiff for recovery of possession thereof, on the ground that the property in dispute was a lakhiraj tenure created by the Raja of Tippera, and that the plaintiff was owner thereof, partly by purchase and partly by inheritance. The lower Appellate Court found as a fact that the late shikmidar, and not the Raja, had granted the lands in dispute as bramatar, but not in favour of the person through whom the plaintiff claimed. The Court, however, passed a decree in favour of the plaintiff, as he had been unlawfully dispossessed. *Held* that the plaintiff having failed to prove the case as set up by him, and upon which he claimed, could not be entitled to a decree upon grounds other than those stated in the plaint. ISWAR CHANDRA CHUCKERBUTTY *v.* BISTU CHANDRA CHUCKERBUTTY [3 B. L. R., Ap., 97 : 12 W. R., 32

45. ——— *Failure to prove case.—Changing case on appeal.*—Each of two proprietors, *A.* and *B.*, separately mortgaged the whole of the joint property to different persons. *B.'s* mortgagee, who was prior in time, obtained a decree on his bond, sold and purchased the house. In a subsequent suit for confirmation of right and possession by *A.'s* mortgagee, he charged that the other bond and decree were fraudulent and collusive, and that *B.* had no interest in the property. All these allegations were found to be false by the lower Appellate Court. *Held*, on special appeal, that the plaintiff could not recede from the case he had made in the lower Courts, and claim to be entitled to a decree for *A.'s* interest in the house. DURSUN SAHOO *v.* PRYAG RAM . . . 2 C. L. R., 538

46. ——— *Failure to show alternative case.—Right to change case in special*

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Possession, Suit for—*continued.*

appeal.—Suit for possession of certain property as part of a joint-family property sold by a widow without authority. Plaintiff applied to appeal specially on the ground, but could cite no authority in support of it, that when the eldest member and manager of the family purchases out of his own separate funds, because the family is joint, the property must be considered as joint property. Having failed in this character, the Court declined to allow him in special appeal to come in as a reversioner, and ask for a decree declaring the widow's act void as against reversioner. MADHO PERSHAD *v.* LALLA JEETUN LALL . . . . . **17 W. R., 98**

47. ——————— *Joint claim.*—*Right to succeed on proof of separate title.*—Where the plaintiffs in a suit put forward a joint claim, it is not enough that one of them makes out his title; the suit should be dismissed unless the joint claim is established. RAM COMUL CHUCKERBUTTY *v.* NUND RAM COOLAL . . . **10 W. R., 262**

SHEO NUNDUN PERSHAD *v.* MUKDOOM BUKSH **[20 W. R., 364**

48. ——————— *Joint claim.*—*Right to succeed on proof of title to less share separately.*—A plaintiff suing on the ground that she was jointly entitled, was not allowed to succeed in the suit where it was shown she was only entitled to a less share in her own separate right. HURRO MONEE DOSSEA *v.* ONOOKOOL CHUNDER MOOKERJEE **[8 W. R., 461**

49. ——————— *Claim to exclusive possession.*—*Proof of right to joint possession.*—When a plaintiff in a suit asks for one thing (*e.g.*, exclusive possession), a Court ought not to give him a decree because he proves that he is entitled to another thing (*e.g.*, joint possession). BEEJOYNATH CHATTERJEE *v.* LUCKHEE MONEE DABEE **[12 W. R., 248**

SREENARAIN CHUCKERBUTTY *v.* MILLER **[15 W. R., O. C., 7**

50. ——————— *Claim to separate possession.*—*Proof of joint possession.*—*Alteration of claim.*—When a plaintiff who claims property on the allegation that he purchased it from a person to whom it exclusively belonged, fails to prove that the property was the separate property of his vendor, he cannot have a decree for the share of the property to which his vendor was entitled as a member of a joint family. GOUR BEHAREE RAM BHUGGUT *v.* SHEORUTTUN KOONWAR . **10 W. R., 243**

51. ——————— *Failure of proof of right to sole possession.*—*Decree on admission of defendant of joint possession.*—Where a plaintiff sued for sole possession and a declaration of sole title, and the defendant admitted that he was in joint possession, but the plaintiff went on with his suit in order to get a decree that he was solely entitled and in sole

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Possession, Suit for—*continued.*

possession, and failed to prove his case, he was held not entitled to a decree founded on joint possession. LUKHUN SINGH *v.* NUFFUR SING . **6 W. R., 311**

52. ——————— *Suit for possession of share.*—*Decree for joint possession.*—In a suit to recover possession of a third part of a khanabari, where the first Court, considering that there never had been a partition in definite shares, ordered restoration to the sort of possession plaintiff had enjoyed previous to being dispossessed,—*Held* that there was no objection to the decree being in that form; and although a plaintiff does not prove the precise claim which he makes, if he is substantially right he ought to have a decree, and not be left to bring another suit. RAJKISHORE BHUDDUR *v.* HUREE MOHUN BHUDDUR . . . . **19 W. R., 195**

Dissenting from BEEJOYNATH CHATTERJEE *v.* LUCKHEE MONEE DABEE . **12 W. R., 248**

53. ——————— *Claim to share of property as being partitioned.*—*Relief inconsistent with allegations on plaint.*—In a suit to recover a quantity of land alleged to have formed part of a joint estate which had descended to plaintiff and his brothers, but which was subsequently divided into separate shares,—*Held* that, upon failure of proof of the allegation of partition, plaintiff might obtain relief upon the first allegation; and the Court below was not debarred by law from framing an issue as to whether plaintiff was entitled to recover to the extent of the interest which he had in the land, if found to be joint property. FUKEER DASS POOROHEET *v.* GOPAL MOOKERJEE . . **12 W. R., 107**

54. ——————— *Claim to property on separate title.*—*Right to decree on joint title.*—The plaintiff alleged in his plaint that the defendant had erected a hut, or challa, upon ground to which he, the plaintiff, was separately entitled. The lower Appellate Court found that the land in dispute was the joint property of both parties, and that the defendant was not at liberty to erect the hut without the express permission of the plaintiff, and ordered the demolition of the challa. *Held* that the plaintiff was not entitled to a judgment upon a ground which was inconsistent with the case set out in his plaint. NABIN CHANDRA MITTER *v.* MAHES CHANDRA MITTER **[3 B. L. R., Ap., 111: 12 W. R., 69**

55. ——— **Pre-emption, Suit for.**—*Claim to right in different ways.*—In a suit to establish a right of pre-emption, where the plaint is framed on right of Shufeh Khuleet, the plaintiff ought not to be allowed to shift his ground and make out a new case as Shufeh Jah. GOBIND ROW *v.* GIRDHAREE SAHOO . . **24 W. R., 355**

56. ——— **Principal and agent.**—*Suit by principal against agent.*—*Failure of suit on grounds pleaded.*—A bank sued *H.*, its agent, who

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Principal and agent—*continued.*

had appointed *N.* to act in the matter of the agency, for money belonging to it which *H.* had paid *N.* for the purposes of the agency, and which was not accounted for by *N.*, claiming the same on the ground that *N.* had been appointed to act as a sub-agent without authority. The lower Appellate Court found that *N.* had been appointed by *H.* to act in the matter of the agency with authority, but, instead of dismissing the suit with reference to this finding, gave the plaintiff bank a decree against *H.* on the ground that he had not exercised ordinary prudence in selecting *N.* as an agent for his principal. *Held* that, inasmuch as the plaintiff bank had not claimed relief on the ground that *H.* had failed in his duty in naming *N.* as an agent for his principal, but on the ground that *N.* had been appointed without authority, and had failed to prove its case, the suit should have been dismissed. HAMILTON *v.* LAND MORTGAGE BANK OF INDIA . . . I. L. R., 5 All., 456

57. ——— **Rent.**—*Suit for arrears of rent. —Failure to prove contract.—Claim for use and occupation.*—Where a plaintiff sued for rent and failed to prove any contract, express or implied, to pay it, he was held not entitled to change his case and ask for compensation for use and occupation. LUCHMEEPUT DOSS *v.* ENAET ALI . . 22 W. R., 346

58. ——— *Suit for rent on unstamped lease.—Failure to prove lease.—Right to recover damages for use and occupation.*—The plaintiff alleged that he had given possession to the defendant of a certain estate, in consideration of the payment by the defendant of annual rent for a term of five years; that the defendant had paid the rent for the first three years of the term, but had neglected to pay any for the last two years, and that since the expiry of the term the defendant had remained in possession; and he claimed to recover possession of the property and a certain sum for its use and occupation by the defendant. He also claimed to recover the same sum as damages for the retention of the estate by the defendant, from the date up to which the defendant had last paid rent. The agreement between the parties was contained in certain letters which were unstamped. *Held* that although the claim to relief made by the plaintiff on the basis of the contract must fail, because there was no evidence of the contract on which the Court could act, yet he could fall back on his claim to recover damages for the use and occupation of the land, as the defendant could not defend his possession, being equally incompetent with the plaintiff to rely on the terms of a contract of which he could not give proof, and as he did not deny the use and occupation alleged, he had no answer to the claim for damages. MACGIVERON *v.* WALLACE . . . 5 N. W., 65

59. ——— *Suit for rent in kind.—Evidence of nugdi rent.*—In a suit for a balance of rent on the allegation that defendants cultivated a portion of plaintiffs' jaghir as bhowli

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Rent—*continued.*

tenants, where defendants denied that they were such tenants and pleaded a mokurrari pottah,—*Held* that even on the defendants failing to establish their plea, the suit could not succeed, as the plaintiffs failed to make out their case, and it appeared that the defendants were holding the whole jaghir at a nukdi rent. LUCHMEEDHUR PATTUCK *v.* RUGHOOBUR SINGH . . . 24 W. R., 284

60. ——— *Suit for declaratory decree.—Suit under Beng. Rent Act, 1869.*—Where the plaintiff sued under Bengal Act VIII of 1869 for a declaration that certain land was mâl, as well as for assessment of rent thereon and for arrears of rent at the rate assessed, and the suit was dismissed, and on appeal the plaintiff abandoned the two last points in his claim and asked merely for a declaratory decree,—*Held* that the lower Appellate Court ought, notwithstanding the plaintiff had elected to sue under the Rent Act, to have proceeded with that part of the case, and disposed of the appeal as to that only. ANUND MOYEE DOSSEE *v.* RAYE MONEE DOSSEE [20 W. R., 14

61. ——— *Suit for kabuliat on allegation of holding specific quantity of land. —Failure to prove allegation.*—In a suit for a kabuliat, on the allegation that the defendant is holding a specific quantity of land under him, if the plaintiff's allegations are disproved, and the relation of landlord and tenant is not established, the plaintiff's suit must altogether fail. YAKOOB ALI *v.* KAERNOOLLAH [8 W. R., 329

62. ——— *Suit for rent.—Failure to prove kabuliat.*—The plaintiff having sued for rent upon a kabuliat, and failed to prove it, is not entitled to a decree if he shows that the defendants had paid him rent for a number of years, the Court observing that it would not be the exercise of a sound discretion to allow a party who relies upon a document to set up a fresh case when an issue as to the execution of such document is found against him, and there are good reasons for believing that the document is not genuine. NURROHURRY MOHONTO *v.* NARAINEE DOSSEE

[W. R., F. B., 23: 1 Ind. Jur., O. S., 9: 1 Hay, 234

S. C. NAIRAINEE DOSSEE *v.* NURROHURRY MOHONTO . . . . . Marsh., 70

WOODOY NARAIN *v.* DURRIAHO ROY [W. R., 1864, 187

RAM NAFFER KHARA *v.* DEGUMBER CHATTERJEE [W. R., 1864, 259

KUREEMOODDEEN BISWAS *v.* HUROCHUNDER GOOHO [1 W. R., 305

GOVIND RAMCHANDRA GOKHLE *v.* AHMED [5 Bom., A. C., 133

BHOYRUB CHUNDER CHOWDHRY *v.* HARADHUN GHOSE . Marsh., 561: 2 Hay, 666

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Rent—*continued.*

SIMROO KAREEGUR *v.* ANUND CHUNDER ROY [Marsh., 57: 1 Hay, 130

See also JEETOO *v.* BEETUN [Marsh., 47: 1 Ind. Jur., O. S., 85: 1 Hay, 112

FATIMA BEBEE *v.* ARIF SOOKANEE [Marsh., 263: 2 Hay, 106

So also in the case of a defendant. GOOROO DOSS GHOSE *v.* SRISTEE DHUR DEY [W. R., 1864, Act X, 39

63. ——— *Suit for pottah at fixed rate of rent.—Failure in proof.*—In a suit brought by a ryot to obtain a pottah at a fixed rent, under section 3 of Act X of 1859, on the ground that the lands have been held at a fixed rent which has not been changed from the time of the permanent settlement, if the plaintiff fail in proving such a holding, he is not entitled in that suit to have a decree under section 5 for a pottah at a fair and equitable rate. DOORGA MAHTOON *v.* KANHYE LALL AJHA [Marsh., 371; 2 Hay, 422

64. ——— *Suit on kabuliat which plaintiff fails to prove.*—Plaintiff sued upon a kabuliat, and filed a pottah in support of it. The pottah having been rejected, and the kabuliat not proved, he was held not entitled to fall back on a general statement that he has a jote pottah; that the lands in dispute are part of the same; and that he can oust the defendant, who was duly in possession. GOBIND CHUNDER LAHORY *v.* JARDINE, SKINNER, & CO. . . . . 7 W. R., 163

65. ——— *Failure to prove right to pottah.—Right to have fair and equitable rate of rent fixed as occupancy ryots.*—The plaintiffs sued as ryots to obtain a pottah corresponding with a kabuliat which they said had been taken from them by the defendants, who were 12-anna shareholders in the land, and, according to an alleged promise, to give them a pottah. The plaintiffs failed to make out the ground on which they relied, but the lower Appellate Court, being of opinion that the plaintiffs had made out a right of occupancy under the rent law and were entitled to obtain a pottah from the zemindar at a fair and equitable rate of rent, and finding no evidence as to what such a rate would be, gave them a decree at the old rate. *Held* that the decision was erroneous, as there was no evidence on which the question of a fair and equitable rate could be determined, and as it rested on a ground not taken by the plaintiffs, who came into Court on a special contract. If the plaintiffs' right to a pottah had rested on the ground of their being occupancy ryots, they might claim a pottah from all the 16-anna shareholders, who ought to have been made parties and the case remanded for trial by the first Court. UTHUR HOSSEIN *v.* RAMPHAL ROY [20 W. R., 75

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Rent—*continued.*

66. ——— *Suit for rent.—Failure to prove kabuliat.*—Where a landlord sued a ryot for arrears of rent alleged to be due under a kabuliat, and the Court found that such kabuliat had not been executed by the ryot, although he had occupied the land, the landlord was held not entitled to have a further trial of the question whether any and what amount of rent was due on account of the ryot's occupation of the land. LUKHEE KANTO DASS CHOWDHRY *v.* SUMEERUDDI LUSKER [13 B. L. R., F. B., 243: 21, W. R., 208

67. ——— *Suit for enhancement of rent.—Suit on kabuliat.—Amendment of plaint.—Decree for rent on failure to prove kabuliat.*—In a suit on a kabuliat, where no alternative claim for rent at an old rate is in words expressly asked for in the plaint (although it is disclosed by the plaint that the defendant had previously occupied the land in suit at a rate which the evidence proved to be lower than the rent mentioned in the kabuliat), and where the kabuliat is not proved, it is in the discretion of the Court to amend the plaint or the issues, and to allow an alternative claim to be tried; and when the omission to make the claim in the plaint appears to have been an inadvertence, it is right that the Court should do so. *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker, 13 B. L. R., 243,* commented upon. ROUSHAN BIBEE *v.* HURRAY KRISTO NATH [I. L. R., 8 Calc., 926

68. ——— *Suit for enhancement of rent.—Statements in plaint.*—Although in a suit for enhancement the plaintiff should not be tied down too strictly to his statements, yet he must to some extent be limited to the case made in the plaint. BONOMALEE CHURN MYTEE *v.* SHOROOP HOOTAIT . . . . . 14 W. R., 60

69. ——— *Suit for enhancement of rent.—Failure to prove rent as claimed.*—If the plaintiff is unable to show that he is entitled to the rent exactly as he claims it, the Court is not debarred from giving him a decree for such enhanced rent as it thinks ought to be paid,—*e.g.*, to divide the land into different classes and assign a separate rental to each description. BHUGWAN CHUNDER ROY CHOWDHRY *v.* JEGUR KHAN [22 W. R., 456

70. ——— *Suit for enhancement of rent.—Failure to prove notice.*—In a suit originally treated by the plaintiff as a suit for enhancement of rent, he cannot, after failing to prove notice, treat the suit as one for enhancement, and say no notice was necessary. RASH BEHARY MOOKERJEE *v.* KHETTRO NATH ROY . 1 C. L. R., 418

71. ——— *Suit for enhancement of rent.—Suppression of material fact.*—A plaintiff must state clearly in his plaint the substance

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Rent—*continued.*

of his claim,—*i.e.*, the particular mode in which his claim arose, as well as the amount of that claim. Thus, where a plaintiff allowed the Court below to decide the case as if his contention was an ordinary case between a landlord suing to enhance and a tenant resisting his claim, and the statement of the defendant divulged the material circumstance of the case that the plaintiff's estate was let in farm, the High Court refused to allow the plaintiff on appeal to rest upon an alleged stipulation in a farming lease, the existence of which he altogether suppressed in the Court below, reserving to him the right of collecting from the tenantry an enhanced rent during the currency of the farming lease. HURRO SOONDERY *v.* MUDDUN MOHUN DUTT [W. R., 1864, Act X, 34

72. ——— **Right of suit.**—*Cause of action not shown in plaint but proved in course of case.*—Where a plaintiff brought a suit for confirmation of his title to an estate, in consequence of the opposition offered by defendant to an application for partition by a vendee who had purchased a portion of plaintiff's share, and the Court of first instance tried the case on its merits and gave the plaintiff a decree,—*Held* that the lower Appellate Court was not justified in reversing the decision of the first Court on the ground that no cause of action had been disclosed, because, although the plaint itself disclosed no cause of action, yet, on the trial of the suit on its merits, a cause of action had been disclosed in the opposition which defendant had offered to the partition proceedings, and which had interfered with the enjoyment of his rights by the plaintiff. LALLAH MAHTAB ROY *v.* DEBEE DUTT SINGH . . 25 W. R., 204

73. ——— **Specific performance.**—*Suit to enforce contract of betrothal.—Failure to prove complete betrothal.*—The plaintiff, on behalf of her infant son, sued the father and guardian of *M. B.* to recover possession of *M. B.*, alleging that *M. B.* had been betrothed to her son, and that under the Hindu law a betrothal was the same as marriage and could not be repudiated, and that the defendant had on demand refused to give up *M. B. Held* that the suit having been brought on the allegation of a perfect betrothal equivalent to marriage, it could not be tried and decided by the Court as if it were a suit for damages on account of breach of contract. NOWBUT SINGH *v.* LAD KOOER . 5 N. W., 102

74. ——— **Title.**—*Setting up different title from that alleged.*—The plaintiff cannot be allowed to set up a different title from that on which he sues and fails to prove. ISHAN CHUNDER CHOWDHRY *v.* SHARODA GOOPTEAH . . 12 W. R., 487

75. ——— *Suit for recognition of adoption.—Right to show title by inheritance.*—A distinct suit for the recognition of an adoption having totally failed, the plaintiff is not entitled to fall back on his right by descent. SREEGOBIND SINGH *v.* ODIT NARAIN SINGH . . W. R., F. B., 4

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Title—*continued.*

76. ——— *Title of separate acquisition by purchase.—Setting up inconsistent title by joint purchase.*—The plaintiff having set up a title by sole purchase, was held not at liberty to change his case entirely, and to come in and set up another and inconsistent title, founded on inheritance or joint purchase. DOSS RAM DOSS *v.* MOHENDRO ROY DECHA . . . . 18 W. R., 274

77. ——— *Allegation of title by purchase.—Failure to prove alleged title.—Possession, Title by.*—In a suit for declaration of title to and possession of certain property on the allegation of purchase and subsequent forcible ouster, it was held that the plaintiff, having failed to prove the purchase or the forcible dispossession, could not succeed on mere proof of twenty years' possession. A plaintiff who sues on one title cannot succeed on another entirely different. HURO SOONDUREE DEBIA *v.* UNNOPOORNA DEBIA . 11 W. R., 550

BIJOYA DEBIA *v.* BYDONATH DEB [24 W. R., 444

78. ——— *Failure to establish particular title.—Title by long possession.*—Where a plaintiff brought a suit to establish his title, and the lower Court, on a trial of the issue, thought the title was not proved, yet gave plaintiff a decree on the ground of his being in possession for a long time,—*Held* that the lower Court ought not to have given a decree upon a ground not suggested in the plaint or in the issues tried. BHAYGO MUTTY BIBEE *v.* MAHOMED WASIL [25 W. R., 315

79. ——— *Failure to prove particular title.—Title by right of occupancy.—Act X of 1859, s. 6.*—In a suit for possession of land after purchase, where defendant pleaded that he had long held under a miras pottah which both the Courts below found to be false,—*Held* that the defendant could not be allowed in special appeal to come in for the first time with an allegation of a new and separate title,—*viz.*, a right of occupancy under section 6, Act X of 1859. SOORJO KOOMAR *v.* GUNGADHUR ROY . . . . . 12 W. R., 80

80. ——— *Failure to prove specific title.—Title by possession.—Form of plaint.*—Where a plaintiff who fails to prove a specific title which he sets up, yet causes it to appear that he has had a clear *bonâ fide* possession from which the Court can infer a good title, the Court will not shut him out in consequence of the mere form of the plaint. KYLASH KAMINEE DOSSIA *v.* JUDOO BASHINEE DOSSIA . . . 22 W. R., 391

81. ——— *Allegation of mokurrari right and failure to prove it.*—In a suit to recover possession of land which defendant alleged himself to have held for more than twelve years under a mokurrari lease, where the lower Appellate

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Title—*continued.*

Court, finding that defendant failed to prove his mokurrari right, declared he had no title to hold as a squatter,—*Held* that, notwithstanding the failure of the defendant to prove his mokurrari lease, the lower Court ought to have found what was the nature of the occupancy, and how long it had subsisted. JORAWUR SINGH *v.* KHYRAT ALI [10 W. R., 360

82. ——— *Suit in one capacity, proof of right to succeed in another.*—A suit was brought by a Hindu widow to recover her share, as heiress to her husband, in certain family property, of which she claimed a portion in her absolute right, and a portion as one of the joint shebaits of certain idols. Among other properties plaintiff claimed one fifth share in a talook, not as a debutter property, but, in right of her husband, as her absolute property. The first Court found that this share was the property of a certain idol, and held that she had not maintained the allegation in her plaint, and even if entitled to it in her right of joint shebait, she could not recover in that capacity, as she had not framed her plaint in that way and had not sued as shebait. The Privy Council held the High Court to be right in treating this objection as one rather of form than of substance, and in giving the relief prayed for. RADHA MOHUN MUNDUL *v.* JADOOMONEE DOSSEE . . 23 W. R., P. C., 369

83. ——— *Amendment of plaint.—Alternative relief.—Ejectment suit.—Failure to prove lease.—General title.*—Where, in an action of ejectment against a tenant holding over, the lease sued on was inadmissible in evidence for want of registration, and the plaint was not amended to one containing an alternative claim for partition,—*Held* that the plaintiff could not be allowed, to fall back upon his general title, and obtain a decree for partition. RAMCHANDRA BAPUJI GOKHLE *v.* VASUDEV MORBHAT KALE [I. L. R., 10 Bom., 451

84. ——— *Right to easement in suit for right of ownership.—Decision on case not made in pleadings.*—In a suit brought to establish a right of ownership over certain land,—*Held*, it was not competent to the Court to enter into and decide upon the plaintiff's right to an easement over the same. A question not raised by the plaint ought not to be decided by the Court. LALJI RATANJI *v.* GANGARAM TULJARAM [2 Bom., 184: 2nd Ed., 176

85. ——— *Title by prescription.—Making case different from that in plaint.*—In a suit for the removal of a pucca building recently erected by defendant upon land lying between the premises of the two parties to the dispute, where plaintiff's claim to use the land had been put upon his title as owner,—*Held* that, having failed to make out the case originally set forth in the plaint, plaintiff had no right to fall back upon a title by prescription. BHOOBUN MOHUN MUNDUL *v.* RASH BEHAREE PAUL . . 15 W. R., 84

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

2. SPECIAL CASES—*continued.*

Title—*continued.*

3. ADMISSION OF PART OF CLAIM.

86. ——— Suit for rent.—*Failure to prove jummabundi.—Form of decree.*—The plaintiff sued for rent at R29 a year on a jummabundi, which he alleged was signed by all the ryots when he came into possession; the defendant denied that he was a party to the jummabundi, but admitted that he held some portion of the land as tenant of the plaintiff at a yearly rent of R5, and that the balance due by him to the plaintiff was R5-15. The plaintiff failed to prove the jummabundi. *Held*, the plaintiff must, if he accepted the admission of the defendant at all, accept it as a whole, and was therefore only entitled to a decree for R5-15, and not to a decree for all the years for which he claimed rent at R4-13 per annum. BONOMALEE CHURN MYTEE *v.* HAFIZUDDEEN . 13 B. L. R., 247, note: 12 W. R., 317

And *see* LUKHEE KANTO DASS CHOWDHRY *v.* SUMEERUDDI LUSKER [13 B. L. R., F. B., 243: 21 W. R., 208

and ROUSHAN BIBEE *v.* HURRAY KRISTO NATH [I. L. R., 8 Calc., 926

87. ——— *Dismissal of suit on failure to prove it.—Right to decree on defendant's admission.*—Where the plaintiff brought a suit for rent for R185, as rent for two years, which he alleged was payable in produce, and the defendants alleged that the rent was only R29 a year, and that the plaintiff had sued them on a former occasion and obtained a decree at that rate, the Judge, finding the defendant's case proved, held that as the plaintiff had set up a false claim, he was not entitled to a decree, and dismissed the suit. *Held*, on special appeal, the plaintiff was entitled to a decree for rent at the rate admitted by the defendant. KISHEN MOHUN MOOKERJEE *v.* RAJOO DEY [13 B. L. R., 245, note: 19 W. R., 234

ROOKHINI KANT ROY *v.* SHARIKATUNISSA BIBI [13 B. L. R., 246, note: 20 W. R., 64

RAJ COOMAR SINGH *v.* CHOTO RAJ COOMAR SINGH . . W. R., 1864, Act X, 12

HULODHUR SEN *v.* SEETUL CHUNDER BHOOMICK [23 W. R., 85

88. ——— *Failure to prove case.—Right to decree on admission of defendant.—Dismissal of suit.*—In a suit for rent, based upon an alleged settlement, the plaintiff failed to prove such settlement. *Held* that no issue having been raised as to what was the fair and proper value of the land, the plaintiff was not entitled to have that question determined: his suit must either be decreed at the rate admitted by defendant, or dismissed. LUTF ALI KHAN *v.* FIKIRA SINGH [6 C. L. R., 208

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

3. ADMISSION OF PART OF CLAIM—*continued.*

89. ——— Suit for arrears of rent.—*Failure to prove rate.—Decree at admitted rate.*—In a suit for arrears of rent, where the plaintiff fails to prove the rate of rent claimed in the plaint, it is the duty of the Court to find the proper rate of rent payable by the tenant to his landlord, and not to give a decree merely for the rent admitted by the tenant. PUNNOO SINGH *v.* NIRGHIN SINGH
[I. L. R., 7 Calc., 298: 8 C. L. R., 310

90. ——— *Suit on new agreement.—Failure to prove agreement.—Decree at admitted rate.*—The defendant held lands under the plaintiff at a certain rate per bigha. The plaintiff brought a suit for arrears of rent on a new agreement alleged to have been entered into by the plaintiff and the defendant, whereby the latter agreed to pay a higher rate per bigha. The lower Appellate Court found that the new agreement had never, in fact, been entered into, and gave a decree for the old rate of rent without going into the question whether it was a fair rent or not. *Held* that the decision was correct. SUFDAR REZA *v.* AMZAD ALI . **I. L. R., 7 Calc., 703: 10 C. L. R., 121**

91. ——— *Failure to prove rent in kind.—Failure to prove case.—Decree on admission of defendant for money rent.*—In a suit for arrears of rent, as bhowli rent, where the plaintiff failed to make out his title to bhowli rent or rent in kind, the first Court, finding that the evidence established a commutation of bhowli rent into rent in money, dismissed the suit, with a reservation of the plaintiff's right to sue again for nagdi rent. The lower Appellate Court, agreeing in the first Court's view of the facts, and finding that the defendant admitted that he owed rent in money, decreed the claim to the extent of the admission. *Held* that the lower Appellate Court was right, and that the reservation of right by the first Court was of doubtful operation. BIBEEJAN *v.* BHAJUL SINGH
[21 W. R., 438

92. ——— Omission to make alternative claim.—*Suit for rent.—Beng. Act VI of 1862, s. 10.*—In a suit for rent, where the claim was at the rate fixed by the revenue officer acting under Bengal Act VI of 1862, section 10, and was dismissed on the ground that that officer had not the power to assess such rent as he thought proper,—*Held* that the plaintiff, whose claim was not in the alternative, was not entitled to a decree at the rate previously paid. DWARKANATH BOSE *v.* RAM LOCHUN BOSE
[23 W. R., 465

93. ——— Suit for ejectment.—*Entry under unregistered lease.—Holding over.—Landlord and tenant.—Proof of terms of lease.—Decree for rent upon admission of different tenure by defendant.*—The plaintiff sued in 1881 to recover certain land and arrears of rent from the defendant, alleging that the defendant's ancestor entered on the land as a tenant in 1865, under a lease for five years, which

VARIANCE BETWEEN PLEADING AND PROOF—*continued.*

3. ADMISSION OF PART OF CLAIM—*continued.*

Suit for ejectment—*continued.*

was not registered. The defendant denied the lease of 1865, admitted that she was the tenant of the land, but denied that she could be ejected, and claimed to deduct from the rent certain emoluments. *Held* (1) that the plaintiff could not prove the tenancy alleged in the plaint, inasmuch as the lease of 1865 was not registered, and, therefore, could not eject the defendant; (2) that the plaintiff was entitled, upon the defendant's admission, to recover from the defendant, in this suit, the amount of rent admitted to be due, and no more. NANGALI *v.* RAMAN . . . **I. L. R., 7 Mad., 226**

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VENDOR AND PURCHASER.

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1. BILLS OF SALE.

1. ——— **Effect of execution of bill of sale without delivery.**—*Specific performance.*—It is very questionable in any case whether the effect of the execution of a bill of sale by a Hindu vendor is to pass an estate, irrespective of the actual delivery of possession. Where the vendor sells an estate of which he is not in possession, in consideration of advances to enable him to sue for its recovery, it is not open to the purchaser, after failing to complete his part of the contract, to claim specific performance and delivery of the recovered estate on tendering the balance of the purchase-money. PRAHLAD SEN *v.* BUDHU SING. KALIPRASAD TEWARI *v.* PRAHLAD SEN [2 B. L. R., P. C., 111: 12 W. R., P. C., 6

S. C. PERHLAD SEIN *v.* BUDHOO SINGH. KALIPERSHAD TEWAREE *v.* PERHLAD SEIN [12 Moore's I. A., 275, 282

2. ——— *Suit to compel transfer of property.*—When a bill of sale, though signed and registered, has not been delivered, and no part of the purchase-money has been paid, the vendor cannot be compelled to complete the transfer. LALLA INDURJEET LALL *alias* GUJADHUR PERSHAD *v.* JUMOONA . . . . 5 W. R., 248

3. ——— *Incomplete contract.*—A bill of sale, though duly executed, was not delivered to the purchaser, but was deposited with a third party, to be held by him until the purchaser should perform certain acts, the performance of which was the consideration for the sale. The purchaser subsequently by a trick got possession of the bill of sale before he had performed all the acts in question. *Held* that, under such circumstances, no effect could be given to the bill of sale as against the vendor, so that a suit for possession of the lands covered by it would not lie. RAJ CHUNDER CHOWDHRY *v.* RAJ NATH CHOWDHRY [W. R., 1864, 222

4. ——— **Vendor under bill of sale remaining in possession.**—*Allegation of fraud.*—*Suit to set aside bill of sale.*—When a person grants a bill of sale to another person absolute in its terms, he cannot sue to have it set aside on the ground that he has all along remained in possession; and if he alleges fraud in the contract, and adduces

VENDOR AND PURCHASER—*continued.*

1. BILLS OF SALE—*continued.*

Vendor under bill of sale remaining in possession—*continued.*

the fact of non-payment of the consideration-money as evidence of fraud, he will be bound to show proof of non-payment. TEKAIT MEGRAJ SINGH *v.* JOYMUNGUL SINGH . . 1 Ind. Jur., N. S., 78

5. ——— **Bill of sale as construed by intention of parties.**—*Right of purchaser to sue.*—Cases will often arise in which, though a bill of sale may in terms purport to convey the property itself, yet it is clear upon the face of the instrument that the intention of the parties was to convey the right of entry or the equity of redemption, and nothing more. In such cases the Court should not lay stress on the mere terms of the instrument, but give effect to the intention of the parties, and recognise the purchaser's right of action to eject the trespasser or to redeem the mortgage. BAI SURAJ *v.* DALPATRAM DAYASHANKAR . I. L. R., 6 Bom., 380

2. BREACH OF COVENANT.

6. ——— **Covenant to restore estate to original owner or heirs at fixed price before selling to another.**—*Sale under reservation to keep in actual possession or re-sell it to vendor at fixed price.*—*Subsequent alienation.*—*Right of reconveyance.*—Where a share in an estate had been sold under a stipulation that the purchaser should possess it himself as landlord, or, if desirous of parting with it, should restore it to the original owner or his heirs at a fixed price; and the purchaser, having been restrained by this agreement from selling off this property to a third person, had, on his retirement to England, given other persons a farming lease of it for fifteen years,—*Held* that as the object of the original stipulation was to secure the constant possession of the share to some one with whom the original owner or his heirs, who still retained the residue of the estate, could keep up friendly relations, the grant of the farmer's lease was a violation of the covenant; and that the heirs of the original owner were entitled to have the share in suit conveyed to them at the stipulated price. RAMNATH SEN LUSHKUR *v.* WISE . 25 W. R., 378

7. ——— **Covenant repugnant to interest created.**—*Contemporaneous "ikrarnamah."*—*Condition restraining alienation.*—*M.*, a co-sharer in a village, transferred to *A.*, another co-sharer, a 2 annas share by deed of sale. Upon the same date *A.* executed an ikrarnamah in which he agreed that he would not collect the rents of the 2 annas transferred to him, that he would not ever demand partition of that share, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it. It was further provided that in the event of *A.* committing any breach of covenant the sale should be avoided, and the proprietary rights in the 2 annas share should re-vest in *M.* *Held* that the deed of sale and the ikrarnamah must be regarded as recording one single transaction,—*i.e.*, they

VENDOR AND PURCHASER—*continued.*

2. BREACH OF COVENANT—*continued.*

Covenant repugnant to interest created—*continued.*

must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which on the face of it professed to be a sale of a 2 annas share to the other by the former; and that, in this view, it was clear from the ikrarnamah that the proprietary title created by the sale-deed was cut down to *nil*, and limitations placed upon it which rendered it useless as a proprietary right. *Situl Pursha*d v. *Luchmi Purshad, I. L. R., 10 Calc., 30, referred to.* MAHRAM DAS *v.* AJUDHIA . I. L. R., 8 All., 452

3. BREACH OF WARRANTY.

8. ——— Suit on warranty.—*Knowledge by purchaser of title being doubtful.*—A purchaser, aware of the doubtful character of the title to the estate he is about to purchase, is justified in taking a guarantee from the seller, who cannot successfully plead to a suit on the guarantee that the purchaser was aware of the facts which induced him to stipulate therefor. PATHOO LAL *v.* RADHIKA DOSS [3 N. W., 106

9. ——— *Sale of whole title.—Failure of title.—Suit for money had and received.*—A vendor legally conveying all his title cannot be sued for money had and received, although the title prove defective. Accordingly, where the plaintiff bought two kanam claims, and sued upon them unsuccessfully,—*Held* that he could not recover the purchase-money from his vendor's representatives, on the ground that the consideration for the payment had failed. MUHAMMAD MOHIDIN *v.* OTTAYIL UMMACHE . . . . . 1 Mad., 390

10. ——— Implied warranty.—*Warranty of title by vendor or mortgagor.—Right to sue for damages.*—A seller or mortgagor must always be held impliedly to warrant the title of the property sold or mortgaged; and if it be found that the title is defective, the vendee or the mortgagee can sue for damages or loss on the breach of implied contract, although there may be no express agreement for title. DWARKA DASS *v.* RUTTUN SINGH [2 Agra, 199

11. ——— *Description published in advertisement.—Warranty of title.—Misrepresentation.—Fraud, Proof of.*—A zemindar (*A.*) gave certain villages in putni to *B.* and received consideration-money and rent from him, but *B.* never got possession of them, nor derived any benefit from the putni, it having been found that the villages belonged to a third party as lakhirajdar, who obtained a decree against *A.* in a suit to which *B.* was made a party. *A.* had published an advertisement setting forth a description of the property, and calling upon intending purchasers to come forward. *Held* that the advertisement published by *A.* setting forth a description of the villages was substantially an implied warranty of title and would make him responsible to purchasers deceived by such misrepresentation; and fraud having been shown, the absence of a stipulation to refund would not protect *A.* from refunding. *Held* that, in cases like this, it would be a sufficient proof of fraud to show that the fact (of ownership) as represented was false, and that the person making the representation had a knowledge of the fact contrary to it. NILMONEE SINGH *v.* GORDON, STUART, & Co. . . . 9 W R., 371

See KHELUT CHUNDER GHOSE *v.* KRISTO GOBIND DEB . . . . . 18 W. R., 276

12. ——— Right to sue on warranty of title.—*Right to refund of consideration.*—A buyer may at once sue on a warranty of title if he can show that the seller has not a good title in accordance with his undertaking, and that he has sustained loss in consequence. *Semble,*—It does not follow as a matter of course that on proof of breach of warranty the buyer is entitled to receive back the whole of the consideration-money, or that on its being ascertained that the seller had no title the conditional sale is nullified. SAYEF ALI *v.* MAHOMED JOWAD ALI [7 W. R., 196

13. ——— Covenant against disturbance of possession.—*Loss of property by third person enforcing right of pre-emption.—Disqualification of purchaser from buying.—Covenant for good title to convey.—Construction of covenant.*—An instrument of sale contained the following condition: "Should any person claim as a co-sharer or proprietor of the property, and assert his claim against the purchaser or raise any dispute of any kind, or if from any unforeseen cause the purchaser be deprived of the possession of the property or any portion thereof, or his possession thereof is disturbed in any way, then I (vendor), my heirs and assigns, shall be liable for the purchase-money, the profits of the property, and costs of litigation." The purchaser having lost the property by reason of a person having a right of pre-emption having sued him to enforce such right and obtained a decree, sued the vendor to recover the costs incurred by him in defending such suit, basing his claim upon the condition set forth above. *Held* that the suit was not maintainable, as such condition referred to flaws or defects in the vendor's title, and was not applicable to a loss accruing to the purchaser from his disqualification to buy. GOLAM JILANI *v.* IMDAD HUSAIN . . . I. L. R., 4 All., 357

4. CAVEAT EMPTOR.

14. ——— Right of purchaser.—*Warranty of title.—Hindu law.—Contract.—Sale of land in Bombay.*—In England the law gives to the purchaser of land a right to have a good title to it shown by the vendor. No such rule appears to exist in the Hindu law and in contracts between Hindus for the purchase and sale of land in Bombay, the intention of the parties must be ascertained from the terms of

VENDOR AND PURCHASER—*continued.*

4. CAVEAT EMPTOR—*continued.*

Right of purchaser—continued.

the agreement, without regard to any implication. DEVSI GHELA *v.* JIVARAJ MUKUNDAS

[2 Bom., 430 : 2nd Ed., 406

15. ———— *Conditions of sale.—Defect in title previous to title shown by vendor.*—When it is provided by conditions of sale of land that the vendor shall not be bound to show any title prior to an instrument of a certain date, the purchaser may insist upon a defect of title appearing *aliunde* and before that date, and if it be proved to exist may rescind the contract and recover back earnest-money, interest, and expenses. MANCHARJI PESTANJI *v.* NARAYAN LAKSHUMANJI

[1 Bom., 77

16. ———— Land sold without warranty.—*Purchaser with invalid title.—Liability of vendor.*—In the absence of fraud or express warranty of title in a sale of land, the vendee cannot recover from the vendor the expenses incurred in defending a suit for possession brought against him by a third party having a better title. NEELMONEE SINGH DEO *v.* GORDON, STUART, & Co.

[1 Ind. Jur., N. S., 356 : 6 W. R., 152

17. ———— Liabilty of purchaser.—*Inquiry as to title.—Eviction after purchase.*—By the rule of *caveat emptor*, the buyer is bound by law to take care of himself and to see that he buys after satisfying himself that there is a good title. The purchaser is bound to look not only to his own title, but to see that he is properly indemnified by the covenants in his deed of purchase; and if he does not choose to protect himself in this manner, he has no remedy; for if a deed of purchase has been once executed, unless there is an evection by the vendor or some person claiming under him, the purchaser has no right of action against the vendor. GOUR KISHORE SHAHA *v.* CHUNDER KISHORE DUTT MOJOOMDAR . . . . . 25 W. R., 45

18. ———— Sale of shares deposited with bank for advance.—*Depreciation of security.—Objection to disclose position of shares.*—Where a contract has been made for the sale of shares deposited with a bank as security for an advance, the vendor is not bound to disclose the fact to the purchaser when there can be no reason to anticipate such a depreciation of value in the shares as would entitle the bank to refuse to transfer. NARAYAN SUCCARAM *v.* BHAWOO DAJEE . 1 Ind. Jur., N. S., 154

19. ———— Fraudulent concealment by vendor of defect of title.—*Absence in sale-deed as covenant for title of purchaser.—Right to damages.*—In 1881 a Hindu executed a sale-deed of a house in the mofussil. The deed contained no covenant for title. The purchaser having been ejected from a portion of the house under a decree, of which the vendor was aware at the time of the sale, sued the vendor for damages. The Munsif decreed the claim on the ground that the vendor had fraudulently concealed the existence of the decree. On appeal the

VENDOR AND PURCHASER—*continued.*

4. CAVEAT EMPTOR—*continued.*

Fraudulent concealment by vendor of defect of title—continued.

District Judge reversed this decree, holding that as the purchaser had not insisted on a covenant for title, he must be held to have accepted all risks. *Held* that, if there had been fraudulent concealment as alleged, the purchaser was entitled to damages. GAJAPATHI *v.* ALAGIA . . I. L. R., 9 Mad., 89

5. COMPLETION OF TRANSFER.

20. ———— Oral transfer.—*Hindu vendor and purchaser.*—Land may pass by mere parol between Hindu vendor and purchaser. MOHESH CHUNDER CHATTERJEE *v.* ISSUR CHUNDER CHATTERJEE

[1 Ind. Jur., N. S., 266

21. ———— Want of registration.—*Sale complete without payment of purchase-money on registration of deed.*—A sale might be complete, and it still might be a condition of the contract that the purchase-money was to be paid afterwards, and the deed in evidence of the contract may not be completed. The bare fact of the deed not being registered would not annul a sale if, by mutual agreement, a sale had already been made. KALEE CHURN GIREE GOSSAIN *v.* LALLA MUDDUN KISHORE

[7 W. R., 317

22. ———— Transfer of ownership of property.—*Decree for specific performance of contract of sale.—Conveyance.*—In the mofussil of the Bombay Presidency, the transfer of the ownership of immoveable property to a vendee who has obtained a decree ordering the specific performance of the contract of sale to himself, does not wait for the execution of a conveyance,—even if the vendor is required, as he seldom is, to execute such a conveyance,—but is effected by the passing of the decree itself, coupled with the payment of the purchase-money. DHONDIBA KEISHNAJI PATEL *v.* RAMCHUNDRA BHAGWAT

[I. L. R., 5 Bom., 554

23. ———— *Possession given in execution of decree.*—The formal possession given by a Civil Court under an execution operates, in point of law and fact, as between the parties, as a complete transfer of possession from one party to the other. LOKESSUR KOER *v.* PURGUN ROY

[I. L. R., 7 Calc., 418

24. ———— *Execution and registration of conveyance.—Failure to pay purchase-money and return of conveyance.*—*D.* sold a house to *P.* and executed a deed of conveyance which was duly registered. The purchase-money, however, was never paid by *P.*, who, consequently, never obtained possession. Shortly after the conveyance had been registered, *P.* returned it to *D.* with an endorsement thereon to the effect that it was returned because *P.* was unable to pay the purchase-money. The right, title, and interest of *P.* in the house was subsequently attached and sold under a decree obtained against him by the plaintiff. The plaintiff became the purchaser,

VENDOR AND PURCHASER—*continued.*

5. COMPLETION OF TRANSFER—*continued.*

Transfer of ownership of property—*continued.*

and sued *D.* for possession. The lower Courts threw out the claim, on the ground that the property had not passed to *P.*, the sale to him being incomplete. *Held*, the sale of the house by *D.* to *P.* was not incomplete. The deed purported to make an immediate transfer of the ownership of the house to *P.*, and *P.* accordingly became the owner of the house. The endorsement on the conveyance, not having been registered, could not affect the property. The plaintiff, therefore, as purchaser of the right, title, and interest of *P.*, became legal owner of the house, but subject to all *P.'s* liabilities; and as *D.* had a lien upon the house for the amount of the unpaid purchase-money, the plaintiff could not obtain possession without paying off this charge. UMEDMAL MOTIRAM *v.* DAVU BIN DHONDIBA . . . **I. L. R., 2 Bom., 547**

25. ——— *Execution of deed of sale.—Failure of purchaser to perform preliminaries to possession.*—The vendor of certain immoveable property agreed to sell such property, and the purchaser agreed to purchase it on the understanding that the purchaser should retain a part of the purchase-money, and therewith discharge certain bond-debts due by the vendor, for the payment of which such property was hypothecated in the bonds. On such understanding the vendor executed a conveyance of such property to the purchaser. *Held*, in a suit by the purchaser for the possession of such property in virtue of such conveyance, that, the purchaser not having paid such bond-debts or done anything to account for such part of the purchase-money according to such understanding, the contract of sale had not been completed, and the suit was therefore not maintainable. IKBAL BEGAM *v.* GOBIND PRASAD . . **I. L. R., 3 All., 77**

26. ——— **Default in completing contract of sale.**—*Partial performance.*—In suits arising out of the default on both sides to complete a contract for the purchase and sale of land in the mofussil, the Court should proceed as a Court of Equity, and should look to the acts and conduct of the parties subsequent to the making of the contract as well as the language of the contract itself; and where the contract has been partially performed and the purchaser put into possession of a portion of the land and allowed by the vendor so to continue long after the period fixed for completion of the contract has elapsed, further time should be given by the Court for the performance of the contract in specie. (TUCKER, *J.*, *dissentiente.*) BALA VALAD SANKIA *v.* GABAJI BALVANT KULKARNI **[2 Bom., 175 : 2nd Ed., 168**

27. ——— **Conditional contract "subject to approval of title by purchaser's solicitors."**—*Rescission.*—*Registration Act* (*III of 1877*), *s. 17, cl.* (*b*).—An agreement for the purchase and sale of certain immoveable property provided that the completion of the contract should be "subject to the approval of the purchaser's solicitors" (naming them), and that if they should not approve of the title, the vendor should refund the earnest-money and pay all costs incurred by the purchaser in investigating the title. The purchaser's solicitors disapproved of the title, and the purchaser rescinded the contract. The agreement was not registered. *Held* in a suit to recover the amount of the earnest-money and costs, that, assuming the objections to be reasonable, the purchaser was entitled to rescind the contract. *Held*, further, that the agreement did not require registration. SREEGOPAL MULLICK *v.* RAM CHURN NUSKUR **[I. L. R., 8 Calc, 856 : 12 C. L. R., 125**

6. CONDITIONAL SALES.

28. ——— **Land sold on condition of re-purchase.**—*Absolute sale.*—Where land was sold on a condition of re-purchase, and no time was mentioned in the instrument of sale,—*Held* that the sale had not become absolute, and that the plaintiff, having bought the original vendor's rights, was entitled to maintain a suit for recovery of the land. GURUSAMY AIYAN *v.* SWAMINADHA AIYAN **[2 Mad., 450**

29. ——— **Deed of conditional sale.**—*Beng. Reg. XV of 1793.*—*Beng. Reg. XVII of 1806.*—*Usufruct.*—A deed of sale executed in 1201 (1794) was subject to the condition that if the vendors, "from the year 1202 to the year 1203, should repay the whole of the consideration-money, they should receive back the deed of sale, which shall then become null and void; and if within the said period they fail to pay the said consideration-money, this conditional sale shall become absolute, and be considered irrevocable." *Held* that Regulation XV of 1793 did not operate to prevent the assignment becoming absolute after the expiration of the time limited for repayment of the consideration, and that Regulation XVII of 1806 had not a retrospective effect, and therefore did not apply; and that even if the entire amount of the purchase-money were satisfied out of the proceeds of estate before the time for the conditional sale becoming absolute, the vendees would acquire a perfect title. BULDEO SINGH *v.* DHUKRUN SINGH . . **Marsh., 632**

30. ——— **Purchaser under conditional sale.**—*Incumbrances.*—A purchaser under a conditional sale takes the property with all *bonâ fide* incumbrances created by his vendor previous to the sale. RADHA MOHUN DEB *v.* NUND LAL DEY **[7 W. R., 363**

7. CONSIDERATION.

31. ——— **Validity of contract of sale.**—*Agreement without consideration.*—*Right to sell afterwards to another.*—A mere agreement to sell

a certain property, without any consideration passing, cannot bar the right of the vendor on the same day to sell a portion of the property to a third party, or invalidate the third party's purchase. BHYUNKUREE DABEE *v.* TABINEE CHURN CHUCKERBUTTY [7 W. R., 38

32. ——— *Non-payment of purchase-money.—Intention to pass subject of sale. —Failure to pay consideration, Effect of.*—Although ordinarily, in a transaction of sale, it may be reasonable to suppose that the seller does not intend to pass the property to the purchaser until the purchase-money has been paid or secured, it is not an absolute rule of law that the non-receipt of the consideration-money in full entitles a vendor to make void a sale which is otherwise complete. MOHUN SINGH *v.* SHIB KOONWER . . . . 1 Agra, 85

HEERA SINGH *v.* RAGHO NATH SUHAI. BHURTH SINGH *v.* RAGHO NATH SUHAI . 3 Agra, 30

33. ——— *Intention of parties.—Failure to pay consideration, Effect of, after execution and delivery of deed.*—The intention of the parties from their acts should be ascertained; and when a deed is executed and delivered to the purchaser, a subsequent default by the purchaser in the due payment of the purchase-money would not, in the absence of fraud, make void the sale, or give any other right to the vendor than a right to sue for the money. Further, if it be proved that the vendor intended to retain possession until full payment, the Court may pass a decree establishing the purchaser's right subject to execution or payment of consideration. MOHUN SINGH *v.* SHIB KOONWER [1 Agra, 85

34. ——— **Plea of valuable consideration.**—*Allegation of seisin of vendor and sale of absolute title.*—A pleading setting up as a defence a purchase for valuable consideration should aver the seisin of the vendor and the sale of his absolute title for good consideration. RADANATH DAS *v.* ELLIOT [6 B. L. R., P. C., 530

S. C. RADHANATH DOSS *v.* GISBORNE & Co. [15 W. R., P. C., 24: 14 Moore's I. A., 1

35. ——— **Failure of consideration.**—*Bonus paid for talook not in existence.—Right to refund of bonus.*—When a bonus is paid for a putni talook not in existence, there is an entire failure of consideration, and the person paying the bonus is entitled to a refund of it. The principle of *caveat emptor* does not apply to such a case. KRISTO LALL MOITRO *v.* NOBBO COOMAR ROY . 5 W. R., 232

36. ——— **Proof of payment of consideration.**—*Non-payment of consideration-money. —Burden of proof.*—In a suit for possession of land alleged to have been purchased under a registered deed of sale, the defendant-vendor admitted the execution and registration of the deed, but denied receipt of consideration. The deed was dated in

January 1876, and the suit was instituted in 1884. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced no evidence in proof of the payment of consideration. *Held* that, although under ordinary circumstances the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed. *Held*, therefore, that in the absence of such evidence, and of evidence to explain the fact of the plaintiff being out of possession, the suit failed. ACHOBANDIL KUARI *v.* MAHABIR PRASAD [I. L. R., 8 All., 641

37. ——— **Part payment of consideration.**—*Right to sue for possession.*—*Held* that non-payment of the consideration-money can be pleaded by the seller, and inquired into by the Court, the admission of the seller at the time of registration before the Registrar being no conclusive proof of payment of the consideration-money, with reference to the practice which obtains of preparing the sale-deed and registering it before payment. Under the ordinary rule of law, a purchaser has a right to sue for possession when a portion of the consideration-money has been paid, unless the contrary be shown to be the intention of the parties, and the seller has a right to sue for the balance of price. GOOR PERSHAD *v.* NUNDA SINGH . . 1 Agra, 160

38. ——— **Right to refund of earnest-money.**—*Agreement for sale of ship.—Failure of consideration.*—Plaintiff and defendants entered into an agreement for the sale by the defendants, who were thereby stated to be the absolute owners of a certain ship, to the plaintiff of the said ship. The defendants agreed with the plaintiff that they would, immediately upon payment of the purchase-money, execute to the plaintiff and another a proper bill of sale of the ship. The defendants were unable to get a properly registered bill of sale of the ship made out, owing to infirmity of their own title, but were willing, so far as they could, to convey. The plaintiff had made part payment in respect of the price of the ship. *Held* that the consideration had failed, and that the plaintiff was entitled to a refund of the money paid by him in part payment, and of sums disbursed by him under the agreement on account of the expenses of the ship. JASSIM BINSAFF *v.* ESAU AHMED . . . 2 Ind. Jur., N. S., 13

39. ——— **Valuable consideration, Question of.**—*Assignment of chose in action.*—The question whether an assignment of any equity of

VENDOR AND PURCHASER—*continued.*

7. CONSIDERATION—*continued.*

Valuable consideration, Question of—*continued.*

redemption admitted by the assignor was made for a valuable consideration or not, is no material in determining the rights of the assignee against a party who holds adversely to the assignor. KACHU BAYAJI *v.* KACHOBA VITHOBA . **10 Bom., 491**

8. FRAUD.

40. ——— Evidence of fraud.—*Inadequacy of purchase-money.*—In considering a case of alleged fraud in the purchase of an estate, it is material to inquire what relation the purchase-money paid bore to the value of the estate. SREEMUNCHUNDER DEY *v.* GOPAUL CHUNDER CHUCKERBUTTY **[7 W. R., P. C., 10: 11 Moore's I. A., 28**

41. ——— *Notice of facts implying bad title.—Mala fides.—Questions of bona fides.*—Notice of fact from which the infirmity of the vendor's title might be inferred is evidence of *mala fides*, but is not itself *mala fides*, and the question of *bonâ fide* purchase is one of fact. SITHA UMMAL *v.* RUNGASAMI IYENGAR . **5 Mad., 385**

42. ——— Effect of fraud.—*Goods obtained by fraud.—Right of vendor.*—Where goods have been obtained by means of a fraudulent purchase, the vendor has a right to disaffirm the contract so as to re-vest the property in himself, and this even if the property had passed to the vendee with the consent of the vendor. Where a vendee purchased cotton, with the preconceived design of not paying for it, the sale did not pass the property: although the cotton may have been, with the vendor's consent, allowed to be placed on the vendee's boat, still the vendee must be considered as the agent of the vendor, and his possession as that of the vendor, and the cotton as still the property of the vendor, as long as the price was not paid. DURSUN LALL PANDEY *v.* INDUR CHUNDER . . . . **6 W. R., 81**

9. INVALID SALES.

43. ——— Fraudulent concealment.—*Knowledge of defect in title, or of incumbrance.*—Where a vendor knowing that he had no right or title to property, or being cognisant of the existence of incumbrances, or of latent defects materially lowering it in value, sold it and neglected to disclose such defects to the purchaser,—*Held* that there was a fraudulent concealment vitiating the contract. PEAREE MOHUN SOOR *v.* ABDOOL SOBHAN CHOWDHRY . . . . . **7 W. R., 258**

44. ——— Misrepresentation.—*Right to recover purchase-money.*—Wilful misrepresentation by a vendor regarding property sold, practised in a matter within his knowledge, and concerning which the purchaser had no adequate means of knowledge, held to vitiate a sale, and to entitle the purchaser to recover the purchase-money actually paid by him. MAHOMED SHARE KHAN *v.* BAHOO BEGUM **[1 N. W., Part II, p. 26: Ed. 1873, 84**

VENDOR AND PURCHASER—*continued.*

9. INVALID SALES—*continued.*

45. ——— Undue influence.—*Fiduciary relationship.—Attorney and client.—Onus probandi.*—A contract of sale or conveyance entered into by any one with a person who stands relatively to him in a position of confidence or trust, is liable to be called in question by the vendor, and to be set aside at his instance, if it be found that the other party made an unfair use of his advantages. This rule of equity applies strongly in a case where any person, acting as an attorney, or as a legal adviser, enters into a contract with his client in respect of the subject of litigation or advice. Undue influence is presumed to have been exerted until the contrary is proved, and the purchaser is bound to show that all the terms and conditions of the contract are fair, adequate, and reasonable. PUSHONG *v.* MUNIA HALWANI **[1 B. L. R., A. C., 95: 10 W. R., 128**

46. ——— *Fiduciary relationship.—Trustee and cestui que trust.*—*J.* and *M.* were named executors of the will of *H.*, who died in 1844. *M.* alone proved the will, but *J.* did not renounce probate until nine years after the death of *H.* and the commencement of litigation. The only act as an executor of *H.* proved against *J.* was that, in a deed executed by him for the conveyance of the share of *H.* in a certain estate in which *J.* was also interested in another capacity, he was described as executor of *H.*, and the deed recited that probate had been granted to him. *Held* that he was by this reason, as well as on the ground of having an unfair advantage in respect of certain property in litigation, precluded from purchasing the interest of *H.'s* sons under a decree. DHONENDRO CHUNDER MOOKERJEE *v.* MUTTY LOLL MOOKERJEE. SREEMANCHUNDER MOOKERJEE *v.* MUTTYLOLL MOOKERJEE . **Cor., 57**

47. ——— Purchase by agent or other person on fiduciary position.—*Fiduciary relationship. — Onus probandi.—Consideration.* — An agent or person in a fiduciary position towards the owner of property purchased by him, is bound to prove that the sale was made for good and sufficient consideration, and must not only prove that the agent had authority to sell, and that the consideration alleged was in fact paid, but also that the consideration paid was a fair price for the property. If the purchase be made by a stranger, such a purchaser need not show that the consideration paid by him is a consideration equal to the value of the property; it will be sufficient for the purchaser to show that the sale was made by a person who had authority from the owner to sell; and, unless the seller can establish a fraudulent connivance between the agent employed to sell and the purchaser, the sale will be binding on the seller on proof of authority of the agent to sell. RUTTA BEBEE *v.* DUMREE LAL . **2 N. W., 153**

48. ——— Deed of sale executed by man of weak intellect.—*Ground for setting aside sale by Court of Equity.*—A Court of Equity will not set aside the voluntary deed of a weak man who is not absolutely *non compos*, unless the weakness as well as the facts surrounding the transaction

VENDOR AND PURCHASER—*continued.*

9. INVALID SALES—*continued.*

Deed of sale executed by man of weak intellect—*continued.*

and the nature of the transaction itself, be such as to satisfy the Court that the person had not at the time a mind adequate to the business, and that he might have been imposed upon, or unless the Court is not satisfied of the good faith of all the parties to the transaction. RAJENDER CHUNDER NEWGEE *v.* BHOOBUN KALEE DEBEA . . **W. R., 1864, 65**

49. ———— Sale by old and illiterate woman without professional advice.—*Fraud. —Undue influence.—Inadequate consideration.—Terms on which deed will be set aside.—Purchase-money declared a charge.—Funeral expenses of Hindu widow declared a charge.—No allowance for repairs and improvements.*—*C.* was the widow of one *R.*, deceased, and from the death of *R.* until her own death remained in occupation of a house and chawl which had belonged to him. *D.* was a sister of *C.'s*, and, shortly after *R.'s* death, *D.* and her son *B.*, the first and second defendants, went to live with *C.* on the said property, and lived with *C.* and were her only companions until *C.'s* death. While so living with *C.*, *D.* and *B.* advanced to *C.* at various times, on joint account, various sums of money, amounting to ₹3,500, for purposes such as would have justified *C.* in pledging the property of her late husband to secure the repayment of the same. *C.* became very ill, and *D.* and *B.*, fearing she might be going to die, requested her to take some steps to secure to them the repayment of the sums they had advanced to her. *C.* thereupon offered to give *D.* and *B.* an absolute deed of sale of the said house and chawl in consideration of the said sum of ₹3,500 already advanced to her, and of an additional sum of ₹500 then to be paid to her to defray her funeral expenses and the costs of the said conveyance. *D.* and *B.* consented, and called in their solicitor to take *C.'s* instructions and draw up the deed in question, which he accordingly did; and within three days of the said agreement the deed was executed. At that time *C.* was very ill, and twelve days after the execution of the deed *C.* died. *C.* was an illiterate woman, over sixty years of age, and had in this matter no independent professional or other advice. The additional sum of ₹500 agreed to be paid to *C.* was never so paid to her, but after her death *D.* and her son expended moneys in and about her funeral ceremonies, amounting, as they alleged, to upwards of ₹400. The property in question so pledged to them for ₹4,000 was worth at least ₹5,200. The plaintiff, one of the heirs of *R.*, sued to set the deed aside and for possession of the said property. *Held* that the deed of sale must be set aside as obtained under circumstances which amounted to fraud. *Held*, also, that the advances, amounting to ₹3,500, made to *C.* by *D.* and her son *B.*, being made for purposes for which *C.* would have been justified in pledging the said property, the deed of sale should be set aside only on the terms that the property in question should stand charged with the repayment of the sums so advanced. *Held*, also, that the property must stand charged with the repayment

VENDOR AND PURCHASER—*continued.*

9. INVALID SALES—*continued.*

Sale by old and illiterate woman without professional advice—*continued.*

to *D.* and *B.* of such a sum as, having regard to her position and station in life, should be found to be a reasonable sum for the funeral expenses of *C.* After *C.'s* death, *D.* and *B.* remained in possession of the said property under the deed of sale, and expended considerable sums of money in and about repairs and improvements to the same; and they now claimed that, if the sale was to be set aside, the sums so expended should be repaid to them. *Held* that no allowance could be made to *D.* and *B.* for sums so expended by them, such sums having been expended at a time when *D.* and *B.* must be taken to have known that they were fraudulently in possession of the property in question. SADASHIV BHASKAR JOSHI *v.* DHAKUBAI . . **I. L. R., 5 Bom., 450**

50. ———— Inadequacy of consideration.—*Actual or constructive fraud.—Cancelment of sale.—Sales by expectant heirs of reversionary interests.*—In the case of a sale by a person, young indeed and in distressed circumstances, but not without advice or means of information, of an estate actually vested in him, but not to be obtained without litigation, the party seeking to set aside the sale must establish the fraud, actual or constructive, which entitles him to relief. It is not sufficient for him to show that he did not receive the full value of the estate to which the result of the litigation might ultimately show him to be entitled. The difference between that value and the purchase-money, if not too disproportionate, may be legitimately taken to represent the difference between certainty and immediate enjoyment on the one hand, and risk, worry, expense, and delay on the other. The exceptional equitable principles which, in a sale by an expectant heir of a reversionary interest, throw upon the purchaser the onus of showing that he gave a fair price, and which, on failure of such proof, entitles the expectant heir to have the sale set aside, have no application in the above case, or in that of every ignorant and improvident person. AZIMUDIN KHAN *v.* ZIA-UL-NISSA . . **I. L. R., 6 Bom., 309**

51. ———— Omission to register.—*Fraud. —Registration Act, XVI of 1864, s. 18.*—Where the sale-deed was executed, and consideration paid, but the deed was not registered within four months, owing to the seller's fraud,—*Held* that such fraudulent vendor could not benefit himself by pleading the provision of law (section 18, Act XVI of 1864) as a bar to the purchaser's claim. PURGAS RAI *v.* JUGGUN SINGH . . . . **2 Agra, Pt. II, 201**

52. ———— Alienation to defeat execution of decree.—*Rights of creditor without specific lien against purchaser.—Fraud.*—On the 3rd October 1865 the plaintiff filed a suit against *D.* to recover certain lands and money. While the suit was pending,—*viz.*, on the 13th October 1866,—*D.* mortgaged part of his immoveable property to defendant *R.*, and on 21st August 1871 executed a deed of sale to defendant *R.* of all the immoveable property of

VENDOR AND PURCHASER—*continued.*

9. INVALID SALES—*continued.*

Alienation to defeat execution of decree —*continued.*

which he (*D.*) was then possessed, for the price of R4,000. On 30th April 1872 the plaintiff obtained a decree against *D.*, and in execution thereof attached certain immoveable property other than the land mentioned in the decree. The defendant *R.* applied under section 246 of the Civil Procedure Code (Act VIII of 1859), and on the 21st August 1873 procured the removal of the attachment, whereupon the plaintiff brought the present suit to set aside the order of 21st August 1873, and to obtain a declaration that the attached property belonged to *D.* and was liable in execution. *Held* that inasmuch as neither the decree of the 30th April 1872, nor the plaint on which it was founded, established or sought to establish any claim against a specific lien upon the immoveable property, the subject of the present suit, it was perfectly competent for *D.*, at any time previously to an attachment of the property, to alienate it, and the question for decision as to that property was whether *D.* had alienated it or not. If the deed of sale by which *D.* conveyed the property on the 21st August 1871 were merely colourable, and the change of ownership ostensible only and not real,—*i.e.*, if it was the intention of the parties that the alienee should be merely a trustee for *D.* to shield the property from execution, and that *D.* should continue to be the beneficial owner of it,—there would not be any alienation, and the deed of sale would be void as against an attaching creditor of *D.* If, on the other hand, the sale were a real transaction,—*i.e.*, if it was the intention of the parties that the full ownership should pass from the vendor to the vendee,—then the sale would be valid, even though it might have been in the contemplation of the parties that future attempts to attach the property by a creditor of the vendor (not having any specific lien on the property) should be defeated by the sale. Until attachment the creditor has no right to interfere with the power of his debtor to deal with his property. RAJAN HARJI *v.* ARDESHIR HORMUSJI

[I. L. R., 4 Bom., 70

SAKHARAM MAHIPAT *v.* DAWUD VALAD JAWABHAI . . I. L. R., 4 Bom., 76, note

BALVANTRAV *v.* JIVANJI HORMASJI

[I. L. R., 4 Bom., 77

53. ——— Sale to two successive purchasers.—*Non-payment of purchase-money.—Right of first and second purchasers.*—The proprietor of certain immoveable property conveyed it first to one person and then to another. The first purchaser sued the vendor and the second purchaser for the possession of the property, alleging that he had been put in possession of it, but had been ousted by the second purchaser. *Held* that the first sale was not void by reason of the non-payment of the purchase-money, and that the second sale being invalid as having been made by a person who had no rights and interests remaining in the property, the second purchaser was not a representative of the vendor and entitled to receive the purchase-money found to be still due to him from the first purchaser, and to retain possession of the property until the receipt of that purchase-money. RAM LAKHAN RAI *v.* BANDAN RAI . . . . I. L. R., 2 All., 711

VENDOR AND PURCHASER—*continued.*

9. INVALID SALES—*continued.*

Sale to two successive purchasers—*continued.*

54. ——— Sale of property not belonging to vendor.—*Loss sustained by purchaser on being dispossessed.*—Where a party sells property to others, and it afterwards appears that he had not the right to do so, and the purchasers are in consequence dispossessed, the loss ought to fall on the vendor, and not on the vendees who put faith in his act of selling. AMANOOLLAH *v.* MAHOMED NASIR

[22 W. R., 442

55. ——— Deed of sale set aside as being fraudulent and void.—*Right of purchaser to compensation for improvements.*—A party in possession under a deed of sale conveying real estate, the property of a defendant in a pending suit, held not entitled to any allowance for sums expended by him for improvement upon the estate, when the deed was found to be fraudulent and void as against the creditors of the vendor, and to have been executed to defeat a sequestration. MUSADEE MAHOMED CAZUM SHERAZEE *v.* ALLY MAHOMED SHOOSTRY . . . 6 Moore's I. A., 27

10. LIEN.

56. ——— Creation of lien.—*Title.—Notice of charge.—English law as to right of bonâ fide purchaser for value without notice.*—By contract and deposit of title-deeds *B.* charged certain land in favour of *A.* as a security in respect of the non-delivery of the title-deeds of an estate bought by *A.* from him. After the creation of this charge the land was transferred by *B.* to *C.* The Sudder Court having decided that the contract was not operative as an hypothecation or pledge, even between the parties to it, and that *A.* had no right of suit against *C.*, to whom the land had been transferred,—*Held* by the Privy Council, reversing that decision, that the agreement created a lien on the land, and that no positive law was shown to forbid the giving effect to such agreement. The owner of property subject to a lien or charge can in general convey to another no title higher or more free than his own; it lies always on a succeeding owner to make out a case to defend such prior charge. The law in India does not enable a purchaser of land to look only to the apparent title in the Collector's books, or the presumed title of the owner in possession; and it is beyond the province of a Court of Justice to give effect to the title of such a purchaser to the extent of defeating a prior lien or charge. Conceding that a purchaser for value, *bonâ fide*, and without notice of the charge, would have an equity superior to *A.'s* right,—*Held* that a purchase in good faith by *C.* had not been proved. If the English doctrine on this subject be adopted, as the rule prescribed by justice, equity, and good conscience, its

VENDOR AND PURCHASER—*continued.*

10. LIEN—*continued.*

Creation of lien—*continued.*

qualifications and restrictions should not be rejected. VARDEN SETH SAM *v.* LUCKPATHY ROYJEE LALLAH [Marsh., 461 : 9 Moore's I. A., 303

57. ——— Purchaser, Right of.—*Produce of land, Sale of.—N.-W. P. Rent Act, XVIII of 1873, s. 56.—Hypothecation.*—The purchaser of the unstored produce of land in the occupation of a cultivator, with notice of the lien created on such produce by section 56 of Act XVIII of 1873, takes such produce subject to such lien. S. A. No. 1393 of 1870, decided on the 4th February 1871, and *Achul* v. *Gunga Pershad, 2 Agra, 73,* followed. KINLOCK *v.* COLLECTOR OF ETAWAH. KINLOCK *v.* COURT OF WARDS . . . . I. L. R., 3 All., 433

58. ——— *Lien by deposit of title-deeds.—Subsequent purchase by another.*—In 1865 *C.* gave *H.* a lien on his property, by a deposit of title-deeds. In 1867 *B.* purchased the same property *bonâ fide,* and without notice of *H.'s* lien. *Held* that *B.* took the property free of the lien. BUNSEEDHUR *v.* HEERA LALL [1 N. W., Part VI, p. 74 : Ed. 1873, 166

59. ——— *Priority.—Inchoate agreement to purchase.—Deposit of earnest-money.*—The claimant entered into an agreement for the purchase of certain property, and on the execution of the agreement deposited ₹15,000 as earnest-money of the contract and in part payment of the purchase-money. The claimant was not satisfied at that time with the title-deeds supplied by the vendor, but afterwards entered into fresh negotiations for the purchase upon different terms. The vendor died, and the present claim was filed in a suit to administer his estate. *Held* that the claimant was entitled to be paid in full the ₹15,000 in priority to all other creditors; and that his lien was not lost by the failure either of the original contract or the subsequent negotiations. KENNY *v.* ADMINISTRATOR GENERAL OF BENGAL . . . 3 B. L. R., O. C., 75

60. ——— *Lien, Concealment of.—Estoppel.*—In execution of a money-decree, the decree-holder caused the right, title, and interest of the judgment-debtor in a certain property, which had been mortgaged to him by a registered bond, to be sold, but without notice of the existence of such lien. He afterwards obtained a decree upon the bond, and sold it to the defendants, who caused the same property to be attached. The purchaser intervened under section 246, but without success. In a suit by the purchaser to establish his absolute right,—*Held* that, as the defendants' vendor had suppressed the fact of the charge, and thereby induced the plaintiff to purchase as the absolute property of the judgment-debtor, they were now precluded from setting up his lien. DULLAB SIRKAR *v.* KRISHNA KUMAR BAKSHI [3 B. L. R., A. C., 407 : 12 W. R., 303

61. ——— Right to enforce lien.—*Sale subject to decree declaring lien on property.*—If a

VENDOR AND PURCHASER—*continued.*

10. LIEN—*continued.*

Right to enforce lien—*continued.*

decree declares a lien over *A.'s* property for a certain sum in favour of *B.*, and subsequently *A.* sells part of this property to *B.* and part to *C.*, *B.* cannot sue to enforce his lien against *C.'s* purchase without bringing his own into contribution. RAM LOCHUN SIRCAR *v.* RAM NARAIN . . 1 C. L. R., 296

11. NOTICE.

62. ——— Necessity of notice of title.—*Equitable doctrine of secret ownership.*—It is a rule of universal equity, and not one peculiar to English Courts, that, in order to enable the real owner of property to recover from a purchaser for value from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the real title, or that there existed circumstances which ought to have put the purchaser on an inquiry which, if prosecuted, would have led to a discovery of the real title. RAMCOOMAR KOONDOO *v.* MCQUEEN [11 B. L. R., 46: 18 W. R., 166 L. R., I. A., Sup. Vol., 40

63. ——— Purchaser without notice.—*Secret ownership.—Fraud.*—A vendee who purchases for valuable consideration, and without notice of benami, from the ostensible owner of the property held by him under an apparently good title, will be protected from subsequent acts of the owner or his heir, both of whom were parties to the fraud; and his purchase will hold good against any subsequent sale made by them. RENNIE *v.* GUNGANARAIN CHOWDHRY . . . . 3 W. R., 10

64. ——— *Equitable relief against forfeiture.*—Remarks on the doctrine of equity as to the applicablity of the defence of purchase for valuable consideration without notice. The defence does not apply where the Court of Chancery is exercising a jurisdiction concurrent with that of the Courts of law. Where *A.* sold land to *B.*, reserving a right to re-purchase by payment of a certain sum at a specified time, and before such time had arrived *B.* re-sold to *C.* for valuable consideration without notice, and *A.* failed to make the payment and forfeited his right to re-purchase,—*Held* that he had no title unless relieved against the forfeiture, and that such relief could not be given as against *C.* SAMAKKAUNDAN *v.* PERUMAL CHETTI [2 Mad., 14

65. ——— *Purchase from joint Hindu family.—Presumption.—Semble,*—That considering the state of Hindu families a purchaser would be affected with notice by much slighter evidence than a purchaser in other countries. KOYILOTHPUTENPURAYIL MANOKI KORAN NAYAR *v.* PUTHEN PURAYIL MANOKI CHANDA NAYAR [3 Mad., 294

66. ——— *Bonâ fide purchaser.—Fraud in vendors.*—A *bonâ fide* purchaser

VENDOR AND PURCHASER—*continued.*

11. NOTICE—*continued.*

Purchaser without notice—*continued.*

should not be deprived of the benefit of an honest purchase, even though the sale to his vendors was fraudulent, if he had no notice of the fraud. GOLAM AHEA *v.* DIGUMBUR SINGH . W. R., 1864, 225

67 ———— *Sale of whole interest.—Subsequent purchase without notice by another.*—The plaintiff purchased from the first defendant, who purchased from the person admitted to be the owner in 1856. The resisting defendants claimed under a subsequent sale by the same person. *Held*, reversing the decree of the lower Court, that on the simple principle that after the conveyance to the first defendant the owner of the land had nothing more to convey, the resisting defendants took nothing and the plaintiff was entitled to recover. VIRABHADRA PILLAI *v.* HARI RAMA PILLAI [3 Mad., 38

See contra, CHIDAMBARA NAYINAN *v.* ANNAPPA NAYAKKAN . . . . 1 Mad., 62

68. ———— *Bonâ fide purchaser.—Omission to make proper inquiries into title.*—In order that a purchaser of immoveable property from a Hindu in the Island of Bombay may be entitled, as against the beneficial owner of such property, to set up the defence of being a *bonâ fide* purchaser without notice, he must show that he has made all proper inquiries into the title and as to the state of the family of his vendor, and of his vendor's predecessors in title for a period of twelve years at least before the date of his purchase. SAVAKLAL KARSANDAS *v.* ORA NIZMUDDIN . 8 Bom., O. C., 77

69. ———— Purchaser, Obligation of.—*Joint Hindu family, Purchase from.*—When a person has notice that another has or claims an interest in property for which he is dealing, he is bound to inquire what that interest is; and if he purchases without doing so, he will be bound, although the notice was inaccurate as to the particulars or extent of such interest. Where the notice is given by the person himself who claims an interest in the property, and it is afterwards proved that he had such an interest,—*Quære*, Whether any amount of inquiry can discharge the purchaser from liability. A purchaser, therefore, from one member of a joint Hindu family is affected with notice of the claims of the other members. On the facts,—*Held* (reversing the decision of the Court below) that no sufficient inquiry had been made in this case. GOBIND CHUNDER MOOKERJEE *v.* DOORGAPERSAD BABOO [14 B. L. R., 337: 22 W. R., 248

70. ———— Incumbrance.—*Fraud.—Equitable mortgage.—Purchaser for valuable consideration without notice.*—The reason for the rule of equity that a purchaser of property, though for valuable consideration, yet with notice of a prior incumbrancer, purchases subject to such incumbrance, is that such purchaser is acting *malâ fide* in taking away the right of the prior incumbrancer by getting the legal estate, while knowing that a prior purchaser has the right to it. But a purchaser for valuable consideration, without notice of the prior right of a third person, is not guilty of or party to a fraud upon the rights of a prior purchaser. The Courts of Equity, therefore, will not interfere with his right to the possession, enjoyment, and disposal of the property; and though, subsequently to his purchase, he may become aware of the prior incumbrance, yet he has the right to convey to a subsequent purchaser, who, at the time of such subsequent conveyance, has notice of the prior right of the third person; and such subsequent purchaser will take the property free from the incumbrance, for neither is he guilty of any fraud in accepting what his vendor had a right to convey, nor would the *bonâ fide* purchaser without notice be able otherwise freely and completely to dispose of the property which he innocently acquired. On the same principles, any subsequent purchaser, however remote, though having notice, must be protected. Where, therefore, the second defendant, having notice of the plaintiff's equitable mortgage, purchased from one who, also with such notice, had purchased from a *bonâ fide* purchaser for value without notice,—*Held* that the second defendant held the property free from the equitable mortgage. *Carter* v. *Carter*, *3 K. and Johns, 617*, distinguished. DAYAL JIVRAJ *v.* JAIRAJ RATANSI . I. L. R., 1 Bom., 273

71. ———— *Bonâ fide transferee for value of mortgaged property.—Ignorance of existing incumbrance.—Held* that a statement in answer to interrogatories, which was made by the purchaser of mortgaged property, to the effect that at the time of the purchase he was aware of the mortgage and believed that it had been satisfied, was no proof of the purchase having been made after notice of a prior mortgage, inasmuch as it was inconsistent with the knowledge of an existing incumbrance. SHEO DAYAL MAL *v.* HARI RAM [I. L. R., 7 All., 590

72. ———— *Purchaser for value.—Notice of prior mortgage.*—The plaintiff in 1867 obtained a decree against one Ramzan Mohidin for payment of a debt by him personally, or in default entitling the plaintiff to recover the amount from the sale of certain immoveable property situated in Gujarat on which the debt had been secured under a sankhat. On the attachment of the immoveable property in execution of that decree, the defendant objected under section 246 of the Civil Procedure Code, and alleged that he had purchased the property in 1865. The attachment having accordingly been raised, the plaintiff sued for a declaration of his right to sell the mortgaged property. Both the lower Courts threw out the plaintiff's claim. On special appeal the decrees of the lower Courts were reversed, and the case remanded for the trial of the issue whether the defendant was a *bonâ fide* purchaser for valuable consideration, without notice of the plaintiff's sankhat or lien on the property in dispute at or before the time of his purchase. GRIDHAR RANCHODDAS *v.* HAKAMCHAND REVACHAND [8 Bom., A. C., 75

VENDOR AND PURCHASER—*continued.*

11. NOTICE—*continued.*

73. ——— **Transfer of property subject to trust.**—*Purchaser for value.—Constructive notice.—Tenant in possession as object of charitable trust.*—If the purchaser of an estate for value takes with notice, actual or constructive, of a trust, he is bound by such trust to the same interest and in the same manner as the person from whom he purchased. A person purchasing an estate where there is a tenant in possession is bound to inquire into the title of such tenant, and if he neglects to do so he takes subject to such rights as the tenant may have. The equities are the same where there is a person in possession as the object of a charitable trust and under the trust. MANCHARJI SORABJI CHULLA *v.* KONGSOO [6 Bom., O. C., 59

74. ——— *Notice.—Right of purchaser.*—*B.*, having been sentenced to transportation for life, presented a petition in the Revenue Court, in which, stating that he owned a certain zemindari estate, and that he had been so sentenced, and that it was necessary to make arrangements for the payment of the Government revenue and the management of the estate, he prayed that his name might be removed from the revenue register and that of *P.* recorded in its stead. *P.* sold the property for consideration, his vendee purchasing without notice of any trust, and it was subsequently put up for sale in execution of a decree against *P.'s* vendee and was purchased without notice of any trust. *Held* that the property could not be followed into the hands of the purchaser at the execution sale. *Durga Prasad* v. *Asa Ram, I. L. R., 2 All., 361*, observed on. HAIT RAM *v.* DURGA PRASAD [I. L. R., 5 All., 603

75. ——— **Constructive notice.**—*Person in possession of subject of sale.*—Where there is a person in possession of an estate other than the nominal owner,—*i.e.*, the person in whose name the title-deed is,—a purchaser, although he may be a purchaser for value, is bound to inquire what is the nature of his possession. If he does not think fit to do so, he takes subject to the rights of the person in possession. HAKEEM MEAH *v.* BEEJOY PATNEE [22 W. R., 8

MASSIM MEAH *v.* SHAM DOSS [22 W. R., 189

76. ——— *Sale in execution of decree.—Sale of property on which there is a lien.*—*Per* KENNEDY, *J.*—An execution-purchaser takes subject to all equities affecting the judgment-debtor, and will be bound by constructive notice in the same way as an ordinary purchaser. *Kinderly* v. *Jervis, 22 Beav., 1*; and *Brewer* v. *Lord Oxford, 6 De G., M. & G., 507*, cited and followed. RAM LOCHUN SIRCAR *v.* RAM NARAIN . . 1 C. L. R., 296

77. ——— *Doctrine of constructive notice.—Secrecy in transaction.*—The Court will not apply the doctrine of constructive notice where the party seeking the benefit of that doctrine has been guilty of secrecy in the transaction with

VENDOR AND PURCHASER—*continued.*

11. NOTICE—*continued.*

Constructive notice—*continued.*

constructive notice of which he seeks to affect a purchaser. HORMASJI TEMULJI *v.* MANKUVARBAI [12 Bom., 262

78. ——— *Notice to agent of purchaser.*—Notice to a purchaser's agent was held to be constructive notice to his principal, so as to fix the latter with a trust, or a burden relative to the subject of purchase which without notice he would have escaped. SEEDEE NAZEER ALI KHAN *v.* OJOODHYA RAM KHAN. MUNSOOR ALI KHAN *v.* OJOODHYA RAM KHAN . . . 8 W. R., 399

79. ——— *Liability of land purchased from Hindu devisee for debts of his testator.—Onus probandi.—Per* PONTIFEX, *J.*—The question how far lands purchased from a Hindu devisee are liable in the hands of the purchaser for the testator's debts, stands on the same footing as a similar question would under the *present* English law. The creditors of the ancestor or testator may follow his lands into the possession of a purchaser from the heir or devisee, if it can be proved that such purchaser knew (1) that there were debts of the ancestor or testator left unsatisfied, and (2) also that the heir or devisee to whom he paid his purchase-money intended to apply it otherwise than in the payment of such debts. But a purchaser ignorant on either of these points has a safe title, for no duty is cast upon the purchaser from the heir or devisee to inquire whether there are any debts of the ancestor or testator, or to see to the application of his purchase-money, even when there is an express charge of debts by the testator on the devised estate—at least when the devisee is also executor; and in such a case the burden of proof is entirely on the creditor to show that the purchaser from the devisee had notice that the latter intended to misapply the purchase-money. For a purchaser to be affected with constructive notice through his solicitor, the latter himself must have actual notice. GREENDER CHUNDER GHOSE *v.* MACKINTOSH

I. L. R., 4 Calc., 897: 4 C. L. R., 193

80. ——— *Fraud.—Registration Acts, Effect of.*—When a person is proved to have had a knowledge of certain facts, or to have been in a position the reasonable consequence of which knowledge or position would be that he would have been led to make further inquiry, which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact. There may be such wilful negligence in abstaining from inquiry into facts which would convey actual notice as may properly be held to have the consequences of notice actually obtained. But if there is not actual notice, and no wilful or fraudulent turning away from an inquiry into, and consequent knowledge of, facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied. Constructive notice may apply as against third persons from a neglect to call for deeds and documents of title, but

VENDOR AND PURCHASER—*continued.*

11. NOTICE—*continued.*

Constructive notice—*continued.*

not to the same extent where a Registration Act is in operation, as it would where no Registration Act prevails. *Agra Bank* v. *Barry, L. R., 7 H. L., 135,* followed. If an agent authorised to sell property commits a fraud against his principal, the principal is the person who ought to suffer and not a stranger. DOORGA NARAIN SEN *v.* BANEY MADHAB MOZUMDAR . . . . I. L. R., 7 Calc., 199

81. ——— *Registration.—Possession.—Registration Acts, Effect of.—English Registry Acts, Stat. 7 Anne, c. 20, s. 1; 2 and 3 Anne, c. 4, s. 1; 6 Anne, c. 35, s. 1; 8 Geo. 2, c. 6, s. 1.—Irish Registry Act, 6 Anne, c. 2, s. 4 (Ireland).*—Neither in England nor in Ireland has mere registration been held to amount to notice to subsequent mortgagees or purchasers. In Bombay the Courts have adopted the rule which prevails in America, and have held that registration does amount to notice to all subsequent purchasers of the same property. Possession has been deemed by Hindu and Mahomedan law, as interpreted in the Presidency of Bombay, to amount to notice of such title as the person in possession may have; and any other person who takes a mortgage or other charge upon immoveable property without ascertaining the nature of the claim of him who is in possession does so at his own risk. This is the rule in England also. The Indian Registration Acts prior to the year 1864, like the Middlesex Registry Act (Stat. 7 Anne, c. 20, sec. 1); the Yorkshire Registry Acts (Stat. 2 and 3 Anne, c. 4, sec. 1; 6 Anne, c. 35, sec, 1; 8 Geo. II., c. 6, sec. 1), and the Irish Registry Act (Stat. 6 Anne, c. 2, sec. 4, Ir.), gave priority of rank to priority of registration. The later Indian Registration Acts—*viz.*, Act XVI of 1864, XX of 1866, VIII of 1871, and III of 1877—proceed upon a different principle. Under them a registered instrument operates from the time at which it would have commenced to operate if no registration had been required or made, and not from the time of its registration, which rule applies both to compulsory and optionally registrable instruments. The earlier decisions, by which registration has in India been permitted to supply the want of possession, may be attributed to this absolute preference so accorded by the earlier Registration Acts to priority of registration. In the reported cases under the Indian Registration Acts passed in and subsequently to 1864, which have not (like the previous enactments) given priority of rank to priority of registration, the Courts have also regarded registration as an equivalent for possession where the instrument *earlier in date* has been registered, but unaccompanied by possession. The Courts have gone a step further, and have held registration under Act XVI of 1864 and the subsequent Acts to amount to notice, and therefore to atone for the absence of, and to be a sufficient substitute for, possession in the validation of title. The rule, however, that registration is equivalent to possession, cannot be applied to cases where the registration of the instrument earlier in date has been effected subsequently to the execution of the instrument set up against it. LAKSHMAN DAS SARUPCHAND *v.* DASRAT [I. L. R., 6 Bom., 168

VENDOR AND PURCHASER—*continued.*

11. NOTICE—*continued.*

Constructive notice—*continued.*

82. ——— *Priority.—Possession.—Vendor and purchaser.—Purchaser without possession.—Subsequent purchaser with possession and without notice of prior purchase.*—The plaintiff purchased the land in dispute on the 28th February 1878, and on the same day lodged his deed of purchase with the Registrar together with the registration fee. It was registered on the 29th April 1878. He was not put in possession of the property. The defendant purchased the same property on the 1st April 1878, and on the following day lodged his deed of purchase with the Registrar together with the registration fee. It was registered on the 26th May 1878. His purchase was accompanied with possession. In a suit brought by the plaintiff against the vendor and the subsequent purchaser for possession of the property,—*Held* that the registration of the plaintiff's deed of purchase, not having been effected until after the execution of the defendant's deed, could not have operated as notice of the plaintiff's deed to the defendant, and, therefore, could not be equivalent to possession. *Held,* also, that as the defendant was a purchaser without notice, either actual or constructive, of the plaintiff's prior purchase, and had taken the precaution of obtaining possession, both parties being Hindus and innocent purchasers, the defendant could not be deprived of the benefit of his possession. HASHA *v.* RAGHO . . I. L. R., 6 Bom., 165

83. ——— *Priority.—Notice of prior contract.—Specific Relief Act, 1877, s. 27.—Oral agreement.—Sale to third person in contravention of agreement.—Civil Procedure Code, 1882, ss. 261, 262.*—Where a *bonâ fide* contract, whether oral or written, is made for the sale of property, and a third party afterwards buys the property with notice of the prior contract, the title of the party claiming under the prior contract prevails against the subsequent purchaser, although the latter's purchase may have been registered, and although he has obtained possession under his purchase. CHUNDER KANT ROY *v.* KRISHNA SUNDER ROY [I. L. R., 10 Calc., 710

See NEMAI CHARAN DHABAL *v.* KOKIL BAG [I. L. R., 6 Calc., 534: 7 C. L. R., 487

84. ——— *San-mortgage in Gujarat.—Priority.—Priority as between a purchaser at execution sale and prior mortgagee by unregistered san-mortgage.—Plea of purchase without notice.*—The general rule in the Presidency of Bombay is that, amongst Hindus, possession is necessary in order to perfect a transfer of immoveable property by mortgage or deed of sale as against subsequent incumbrancers or purchasers. The main ground of this rule is that possession is notice to all subsequent intending mortgagees or purchasers of the title of the party in possession. It is, however,

VENDOR AND PURCHASER—*continued.*

11. NOTICE—*continued.*

Priority—*continued.*

the established and judicially recognised custom of Gujarat that possession is not necessary in the case of a san-mortgage to validate it as against subsequent mortgagees or purchasers. The necessity of possession being thus dispensed with, it seems to follow that a san-mortgage, in other respects good, is valid as against a subsequent mortgagee or purchaser, whether or not such mortgagee or purchaser has notice of the san-mortgage. To hold that a subsequent mortgagee or purchaser for valuable consideration and without notice of a san-mortgage is entitled to priority over it, would be tantamount to depriving the san-mortgagee of the benefit of the custom that possession is unnecessary. *Per* MELVILL, *J.*—Such perfect security is now afforded by registration that there appears to be hardly room for the plea of purchase without notice. Seeing that a purchaser may secure himself against all unregistered mortgages without possession by simply taking possession or registering his conveyance, he is, if he omit to do so, in *pari delicto* with the prior mortgagee, and it is difficult to see how he is entitled to any relief. SOBHAGCHAND GULAB CHAND *v.* BHAICHAND . . . . **I. L. R., 6 Bom., 193**

12. POSSESSION.

85. ——— Vendor remaining in possession.—*Presumption.*—Where a deed was executed conveying a man's entire property to his son, only two years old, and reserving to himself one rupee a day for his subsistence, and after execution the conveying party remained in possession,—*Held* that, in the absence of explanation, no other inference could be drawn than that the deed was merely intended to be used as a blind. SREENATH SINGH CHOWDHRY *v.* HUREEPREA **[10 W. R., 449**

86. ——— *Condition of sale.—Acceptance of security by vendor.—Suit to realise security.*—The defendant purchased certain jewels at a sale by auction, subject to a condition that, if not paid for in three days, the goods should be sold at the risk of the purchaser. Being unable to pay within the time stipulated, he gave a promissory note for the price, upon an agreement that the vendor should retain the jewels for him, but should not exercise the power of sale within three days. *Held* that the vendor could sue on the note, though he retained the jewels in his possession under the lien so created. ALLEN, HAYES, & Co., *v.* ANUNDO CHUNDER MUNDLE . **Bourke, O. C., 156**

87. ——— Absence of change of possession.—*Hindu law.—Incomplete sale.*—According to Hindu law, a change of possession is necessary to complete a sale of corporeal property, in order to prevent successive purchasers from being cheated by successive sales of the same property, and to obviate disputes as to what was really sold. A purchaser from a Hindu vendor, who buys corporeal property without possession, does not thus obtain a

VENDOR AND PURCHASER—*continued.*

12. POSSESSION—*continued.*

Absence of change of possession—*continued.*

title which, in a suit for specific performance against the vendor, he can enforce against a person actually in possession under a title adverse to the vendor by joining that person as a defendant. KACHU BAYAJI *v.* KACHOBA VITHOBA . **10 Bom., 491**

88. ——— Necessity of change of possession.—*Hindu and Mahomedan laws.—Priority.*—It is a general but not an invariable rule that possession in the grantee or assignee is deemed essential amongst Hindus and Mahomedans to the complete transfer of immoveable property, either by gift, sale, or mortgage. Exceptions to the above rule pointed out. LAKSHMAN DAS SARUPCHAND *v.* DAVRAT **[I. L. R., 6 Bom., 168**

SOBHAGCHAND GULABCHAND *v.* BHAICHAND **[I. L. R., 6 Bom., 193**

89. ——— *Hindu law.—Delivery of possession.—Notice.*—Delivery of possession of property sold is, under the Hindu law, essential to complete the title of the vendee against a third party purchasing with possession from the same vendor without notice of the prior transaction. The rule prevails as between competing conveyances both of which have been registered. Authorities and Hindu law texts on the subject reviewed. LALUBHAI SURCHAND *v.* BAI AMRIT **[I. L. R., 2 Bom., 299**

90. ——— Sale when vendor is not in possession.—*Hindu law.—Necessity of possession.—Ejectment.*—A Hindu, whose estate is in the possession of a trespasser or a mortgagee, may sell his right of entry as such, or his equity of redemption as such, and the purchaser may thereupon sue to eject the trespasser or to redeem the mortgage; but a bill of sale by a Hindu vendor, purporting to convey the estate itself, executed by a person who is not in possession, cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment. *Prahlad Sen* v. *Budhu Singh, 2 B. L. R., P. C., 111;* and *Bhobosoonduree Dasseah* v. *Issur Chunder Dutt, 11 B. L. R., 36,* followed. *Bikan Singh* v. *Parbutty Koer, 22 W. R., 99; Gungahurry Nundee* v. *Raghubram Nundee, 14 B. L. R., 307;* and *Lokenath Ghose* v. *Juggobundhoo Roy, I. L. R., 1 Calc., 297,* referred to. BAI SURAJ *v.* DALPATRAM DAYASHANKAR . . . **I. L. R., 6 Bom., 380**

91. ——— Possession, Delivery of.—*Hindu law.—Sale.*—Possession is not essentially necessary by Hindu law to give validity to a transfer by sale of immoveable property. BHUKAN BHAIBAVA *v.* BHAIJI PRAG . . . **1 Bom., 19**

92. ——— *Title.—Hindu law.*—Delivery of possession is not necessary to the transfer of ownership among Hindus. *Per* MARKBY, *J.*—As a general rule of law, when a vendee has got a document which in terms professes to make over property, and the document is registered (in case

VENDOR AND PURCHASER—*continued.*

12. POSSESSION—*continued.*

Possession, Delivery of—*continued.*

registration is necessary), he becomes at once the owner without actual delivery of possession. GUNGAHURRY NUNDEE *v.* RAGHUBRAM NUNDEE
[14 B. L. R., 307: 23 W. R., 131

93. ——— *Hindu law.*—*Per curiam*,—Delivery of possession is not, under the Hindu law, essential to complete the title of a purchaser for value. NARAIN CHUNDER CHUCKERBUTTY *v.* DATARAM ROY
[I. L. R., 8 Calc., 597: 10 C. L. R., 241

NAGUBAI *v.* MOTIGIR GURU . . 1 Bom., 5

94. ——— *Hindu law.*—Under the Hindu law current in the Madras Presidency, possession is not necessary to complete a sale. VASUDEVA BHALLU *v.* NARASAMMA
[I. L. R., 5 Mad., 6

95. ——— **Want of possession.**—*Hindu law.*—*Sale before Transfer of Property Act.*—*Possession.*—Under the law administered in the Madras Presidency in the case of sales of land between Hindus made before the date of the Transfer of Property Act, 1882, where all has been done that the parties contemplated to complete a sale, the title of the purchaser cannot be defeated in favour of a second purchaser merely by reason that the latter obtained and the former did not obtain possession. RAMASAMI AYYANGAR *v.* MARIMUTTU BHATTAN
[I. L. R., 6 Mad., 404

96. ——— *Sale of land by a Hindu.*—*Vendor without possession.*—*Conveyance of right of action.*—Where a Hindu vendor sold his share in certain land, but expressly stated in the deed of sale that he was out of possession; that the land was in the hands of a third party, to whom it had been mortgaged without the vendor's authority; and that he (vendor) empowered the purchaser to bring a suit against the person in possession in order to recover the vendor's share in the land, with mesne profits,—*Held* that what the deed contemplated was nothing more than the transfer of the right of entry, although, according to the invariable mode of expression in such documents, the vendor professed, in terms, to convey the property itself. *Held*, further, that the purchaser acquired the same right of action which his vendor possessed, notwithstanding that the vendor was not in possession at the date of the sale. VASUDEV HARI *v.* TATIA NARAYAN
[I. L. R., 6 Bom., 387

97. ——— *Transfer of property by a person not in possession.*—*Validity of such transfer.*—*Hindu law.*—The plaintiffs sought to recover possession from the defendants of certain land, claiming under a kararnama executed to them by one *M.* The defendants contended that *M.* had never been in possession of the land. The lower Appellate Court held that as *M.* was not in possession at the time en the kararnama was executed, the

VENDOR AND PURCHASER—*continued.*

12. POSSESSION—*continued.*

Want of possession—*continued.*

plaintiff's claim was not maintainable. On appeal to the High Court,—*Held*, reversing the decree of the lower Appellate Court, that the circumstance of *M.'s* not having been in possession at the time the kararnama was executed did not prevent the plaintiffs from recovering possession from the defendants. *Kalidas* v. *Kanhaya Lall*, *I. L. R., 11 Calc., 121: L. R., 11 I. A., 219*, referred to and followed. UGARCHAND MANAKCHAND *v.* MADAPA SOMANA . . . I. L. R., 10 Bom., 324

98. ——— *Hindu law.*—*Sale of land.*—Though, by Hindu law, on a sale of land it is not absolutely necessary that the purchaser should be put in possession, it is requisite that the vendor should at the time of sale be in possession of the property sold. GIRDHAR PARJARAM *v.* DAJI DULABHRAM . . . 7 Bom., A. C., 4

99. ——— *Mahomedan law.*—*Sale when vendor is out of possession.*—A sale among Mahomedans, unlike a sale between Hindus, is valid as against a third party, even though the vendor was not at the time of the sale in possession of the property sold. ADAMKHAN *v.* ALARAKHI
[I. L. R., 6 Bom., 645

See also MOHINUDIN *v.* MANCHERSHAH
[I. L. R., 6 Bom., 650

13. PURCHASE OF MORTGAGED PROPERTY.

100. ——— **Bonâ fide purchase without notice of prior charge.**—*Per* PEACOCK, *C. J.*, NORMAN, and PUNDIT, *JJ.* (BAYLEY and CAMPBELL, *JJ.*, dissenting).—The fact of a purchase of land under a deed of sale being *bonâ fide* and without notice of a prior charge, does not pass the land free from the prior charge. MAHESWAR BAX SING *v.* BHIKHA CHOWDHRY
[B. L. R., Sup. Vol., 403
S. C. 1 Ind. Jur., N. S., 122: 5 W. R., 61

101. ——— **Obligation of purchaser.**—*Inquiry by intending purchaser.*—An intending purchaser of property which has been previously mortgaged, who has no reason to suppose it to be joint family property, or the vendor to be a member of a joint family, and who has inquired of and learnt from the mortgagee that there was no fraud, is not bound to make any further inquiry. KYLASH KAMINEE DOSSEE *v.* TARINEE CHURN BOSE
[20 W. R., 100

102. ——— **Priority.**—*Mortgage.*—*Possession.*—*Registration.*—A registered mortgagee, though without possession, is entitled to priority over a subsequent purchaser. SUNDAR JAGJIVAN *v.* GOPAL ESHVANT . . . 4 Bom., A. C., 68

But an unregistered mortgage without possession is not valid against a purchaser with possession. GANPAT BAJASHET *v.* KHANDU CHAUGSHET
[4 Bom., A. C., 69

VENDOR AND PURCHASER—*continued.*

13. PURCHASE OF MORTGAGED PROPERTY —*continued.*

103. ——— Mortgage by member of joint Hindu family.—*Surrender of equity of redemption.—Purchaser for valuable consideration.—Pleading.*—A member of a joint Hindu family granted a usufructuary mortgage: he subsequently, without the knowledge of the co-partners, released the equity of redemption. On hearing of this, the co-partners contested the validity of the release. *Held* that the parties claiming from the person to whom the release was made, took, so far as the co-partners were concerned, a title only as mortgagees. RADHANATH DAS *v.* ELLIOTT . . **6 B. L. R., 530**

S. C. RADHANATH DAS *v.* GISBORNE & CO.
[15 W. R., P. C., 24: 14 Moore's I. A., 1

104. ——— Purchase by mortgagee.—*Possession.—Priority.—Registration.*—A registered mortgage without possession has priority over a subsequent registered sale and conveyance with possession. By a duly-registered deed, *D.* mortgaged land to the plaintiff with power of sale. On default made by *D.*, the plaintiff brought a suit for a sale of the mortgaged land; but, pending the suit, *D.* sold the land to the defendant, who registered his conveyance and entered into possession. The plaintiff subsequently obtained a decree, and at the execution sale became himself the purchaser. In the present suit he sought to recover possession from the defendant. *Held* that the plaintiff was entitled to recover. His rights as mortgagee included the right of bringing to sale the property as it subsisted at the date of the mortgage. The property having been so brought to sale, the purchaser acquired a right free from any created subsequently to the mortgage and subject to it. SHRINGARPURE *v.* PETHE
[I. L. R., 2 Bom., 662

105. ——— Rights of mortgagee.—*Mortgage, Sale without disclosing.—Estoppel.*—The three senior members of an undivided Hindu family—the remaining members of which had disappeared—setting forth a ground of necessity, executed to the plaintiff, in November 1870, a mortgage, duly registered, of a piece of land which formed part of the family estate. Certain judgment-creditors of the absent member subsequently attached and sold his share in the said land under their decree. The plaintiff's undivided son purchased it, and in 1872 re-sold his right, title, and interest in it to the defendant's father, without disclosing the fact of his father's mortgage, but without any active fraud on the part of himself or his father to suppress the fact from the knowledge of his purchaser. In 1874 the plaintiff obtained a decree upon his mortgage, and attached the land. In a suit by the plaintiff to establish his right as against all the land included in his mortgage,—*Held* that the mortgage being, under the circumstances, a valid one, the sale of the absent son's share was subject to the lien created thereby, which lien was not disturbed by the purchase and subsequent sale of the share by the son of the mortgagee. The origin of the son's title was stated in the deed of sale to the new purchaser, who, by the fact of its being a sale of

VENDOR AND PURCHASER—*continued*

13. PURCHASE OF MORTGAGED PROPERTY —*continued.*

Rights of mortgagee—*continued.*

a share, was put upon inquiry. The mere want of disclosure, by the plaintiff's undivided son, of his father's mortgage, was not enough to create an estoppel against his father seeking to establish his claim under the mortgage. JOSHI *v.* JOSHI
[I. L. R., 2 Bom., 650

106. ——— *Sale of equity of redemption.—Right of purchaser.—Parties.*—By two deeds, dated respectively the 22nd February 1868 and 7th September 1872, and duly registered, *A.* mortgaged the lands in dispute to *B.* for a term of years which expired in 1880. On 10th October 1878 *A.* executed a razinama in favour of *B.*, relinquishing all his right in the said lands, and *B.* next day executed a kabuliat to Government for the lands, which thenceforward were entered in *B.'s* name. Previously to the second mortgage and razinama to *B.*,—*viz.*, on 21st March 1870.—*A.* had, by a duly-registered deed, mortgaged the same lands to the plaintiff, who in 1874 brought a suit against *A.* upon his mortgage and obtained a decree, under which he sold the mortgaged property, and became himself the purchaser thereof. Before and at the time of the institution of this suit, *B.* was in possession of the mortgaged land, but was not made a party to the suit. In 1877 *B.* sold the land to *C.* by a duly registered deed. In a suit brought by the plaintiff against *B.* and *C.* to recover possession of the land so purchased by him as above mentioned, at the sale in execution of his own decree,—*Held* that *B.'s* possession at the date of the plaintiff's suit upon his mortgage was sufficient to put the plaintiff on inquiry, and to constitute legal notice to him that the equity of redemption was at that time vested in *B.*, and it was therefore the plaintiff's duty to have made *B.* a party to the suit brought by him against *A.*, who had then alienated the equity of redemption to *B.*; and not having done so, the plaintiff could not rely, in support of his own title, upon a purchase under his own irregularly-obtained decree, and could not, therefore, stand in a better position as against *B.* than if his original suit had been properly constituted,—*i.e.*, he was bound to give *B.* an opportunity of redeeming his mortgage. NARU *v.* GULABSING
[I. L. R., 4 Bom., 83

107. ——— Purchase subject to mortgage.—*Right to redeem.—Good title at time of hearing of suit.—Certificate of sale.*—The property in dispute was mortgaged by its owner to the defendant with possession on the 3rd October 1847. On the 3rd December 1861 *A.* obtained a money-decree against the son and heirs of the mortgagor. In execution of that decree the property was sold subject to the mortgage, and purchased by *B.* on the 12th August 1864. Before confirmation of the sale, *B.*, on the 1st September 1864, sold it to *C.*, who, on the 30th March 1877, conveyed it by deed to the plaintiff. On the 27th September 1877 the plaintiff brought a suit for redeeming the property, and at the hearing produced a certificate of sale, dated the 27th

VENDOR AND PURCHASER—*continued.*

13. PURCHASE OF MORTGAGED PROPERTY —*continued.*

Purchase subject to mortgage—*continued.*

October 1877. The certificate was applied for in May 1877, and issued to *C.*, reciting the sale to *B.*, and the sale by *B.* to *C.* The Court of first instance allowed the plaintiff to redeem on payment of a certain sum of money to the defendant. The Assistant Judge, on appeal, reversed the decree of the first Court on the ground that the certificate of sale was not in existence at the date of the institution of the suit, and that, therefore, the plaintiff had then no complete title. On appeal to the High Court,—*Held* that the plaintiff, having purchased and paid for the equity of redemption, was entitled to redeem, although the certificate of sale was not issued until after the suit had commenced. If a party, whose title is to some extent imperfect, seeks to redeem, and is able to prove a perfect title at the hearing of his cause, he should have a decree for redemption. *Harkisandas Narandas* v. *Bai Ichha, I. L. R., 4 Bom., 155,* and *Lalbhai Lakhmidas* v. *Naval Mir Kamaludin Husen Khan, 12 Bom., 247,* explained and distinguished. KRISHNAJI RAVJI *v.* GANESH BAPUJI [I. L. R., 6 Bom., 139

108. ——— Purchaser of mortgagor's interest.—*Priority.—Purchaser of value without notice of a prior san-mortgage.—Suit by mortgagee against purchaser to establish right to attach property.—Right of purchaser to redeem.—Parties.—Form of decree.*—On the 23rd March 1869 a house was mortgaged by its owner, *P.*, to *J.* by a san-mortgage. After the death of *P.*, his heirs, *D.* and *T.*, on the 9th July 1869, executed to the plaintiff a san-mortgage of the same house for R62. That mortgage was neither registered nor accompanied with possession. On the 27th July 1869 *D.* and *T.* sold the house to the defendant. The deed of sale was not registered. A part of the purchase-money was applied to the payment of the first san-mortgage, which was then delivered up to the defendant, with a receipt on it by *J.*, who acknowledged to have received from the defendant the amount due on his mortgage. The defendant, however, omitted to take an assignment of that mortgage to himself. The plaintiff sued *D.* and *T.* on his san-mortgage of the 9th July 1869, and in 1872 obtained a decree for the recovery of the mortgage-debt out of the mortgaged property. The defendant was not made a party to that suit. The plaintiff attached the house in execution of his decree, but the attachment was raised on the application of the defendant under section 246 of the Civil Procedure Code, Act VIII of 1859. The plaintiff then sued the defendant to establish his (plaintiff's) right to attach and sell the house under his san-mortgage. The defendant answered that he was a purchaser for value, without notice of the plaintiff's mortgage. The plaintiff's claim was dismissed by the first Court, but allowed by the Appellate Court. On special appeal,—*Held* that the defendant's plea that he was a purchaser for valuable consideration, and without notice of the plaintiff's san-mortgage, would not avail to defeat that mortgage under the established usage of Guiarat in favour of san-mortgages. *Held*, further,

VENDOR AND PURCHASER—*continued.*

13. PURCHASE OF MORTGAGED PROPERTY —*continued.*

Purchaser of mortgagor's interest—*continued.*

that the defendant, having become entitled by his purchase at least to the equity of redemption in the house, ought to have been made a party to the plaintiff's original suit on his mortgage, and was not bound by the decree in that suit, and was entitled to a reasonable time to redeem the house from the plaintiff's mortgage. *Sobhagchand Gulabchand* v. *Bhaichand, I. L. R., 6 Bom., 193,* followed. NARAN PURSHOTAM *v.* DOLATRAM VIRCHAND [I. L. R., 6 Bom., 538

14. PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER.

109. ——— Non-payment of purchase-money.—*Tender.—Payment into Court.—Suit for specific performance.*—Plaintiff had entered into a contract with one of the defendants for the purchase of certain immoveable property, and after he made a small advance the contract was written out and registered. The purchaser refusing to pay up the purchase-money unless the vendor paid the costs, or half the costs, of registration, the latter resold the property to a third person. The present suit was to compel the completion of the contract and delivery of the property. *Held* that the Court was bound to see whether it was or was not the intention that a complete and binding sale should take place, although the purchase-money was not paid. *Held*, also, that in bringing such a suit, the plaintiff was bound, if he had not previously tendered the money to the defendant, to pay it into Court. MAHADOO BEGUM *v.* HUBEEBOOL HOSSEIN . . 15 W. R., 44.

110. ——— Advance of purchase-money.—*Lien on purchase.—Repayment.—Suit for possession.—B.* advanced money to *A.* for the purchase of an estate. The estate was purchased by *A.*, but it was conveyed to *B.* *Held* that before *A.* could maintain a suit to obtain possession of the land, he was bound to pay or tender the money advanced by *B.* BHOYRUB CHUNDER SEIN *v.* ANUNDMOYE CHOWDHRAIN . . . . Marsh., 494

111. ——— Right to refund of purchase-money.—*Failure to give possession.—Suit for purchase-money.*—A purchaser of property of which possession was contracted to be given, but the vendor is unable to fulfil the contract, is at liberty to sue for repayment of the purchase-money, and is not obliged to sue for possession of the property. MOHUN LAL *v.* BEHAREE LAL . . 3 N. W., 336

112. ——— *Bonâ fide purchaser.*—*Refund of purchase-money.*—A *bonâ fide* purchaser was held to be entitled to a refund of the purchase-money in a case where some dispute having arisen as to the purchase, the matter was referred to arbitration; and it was held that the vendor had no authority to sell. The principle of *caveat emptor*

VENDOR AND PURCHASER—*continued.*

14. PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER—*continued.*

Right to refund of purchase-money—*continued.*

does not apply to such a case. KISHEN MOHUN SHAHA *v.* RAM CHUNDER DEY . **3 W. R., 28**

113. ——— *Refusal to perform contract.—Omission to repudiate sale.—Suit for recovery of purchase-money.*—The defendants had sold certain property to the plaintiff. They afterwards refused to effect mutation of names in favour of the plaintiff, on the ground that he had not paid off a certain mortgage on the property, which he had promised in the contract of sale to do. They did not repudiate the sale or the plaintiff's title under it. *Held* that the refusal was not tantamount to a rescission of the sale, and that a suit for the recovery of the purchase-money would not lie. SIRAJ-OOD-DOWLAH *v.* NOOR AHMUD . . . . **5 N. W., 194**

114. ——— *Suit to recover deposit of purchase-money.—Obligation to tender conveyance for execution.*—In a suit by a purchaser of immoveable property to recover a deposit, paid by him on account of the purchase-money to the auctioneer, the vendor having refused to convey to the purchaser, save by a deed which should describe the premises by reference to another deed, not shown to the purchaser at the auction, and of the contents of which he had not then any notice,—*Held* that the purchaser was not bound to have tendered a conveyance engrossed to the vendor for execution, together with the residue of the purchase-money, before suing to recover the deposit. ESSAJI ADAMJI *v.* BHIMJI PURSHOTAM . . . **4 Bom., O. C., 125**

115. ——— *Illegal sale.—Sale by coparceners without assent of others.*—Where a sale by two coparceners in favour of another was set aside, on the ground that the sale by a coparcener without the consent of the others was illegal,—*Held*, on the suit of the vendee to recover the purchase-money from the descendants of the vendors, that the purchase-money was like a debt, and payable by the heirs, in proportion to the shares inherited by each. OOMEDEE *v.* CHEDA LALL **[2 Agra, 264**

116. ——— *Refund of purchase-money by heir taking after widow.—Held* that a party succeeding as heir to an estate, the sale of which, by the widow of the person from whom he inherits, has been set aside, is bound to refund the purchase-money paid to the widow for the purpose of discharging liabilities on the estate. ROOSTUM SINGH *v.* ALUM SINGH . . . **1 Agra, 291**

117. ——— *Failure to register.—Suit for refund of purchase-money.—Set-off.*—The plaintiff agreed to purchase land and paid down the purchase-money, taking from the vendor an agreement that if he did not register the conveyance he would return the purchase-money. The plaintiff entered into possession, but the vendor failing to register the conveyance, he sued to recover back his

VENDOR AND PURCHASER—*continued.*

14. PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER—*continued.*

Right to refund of purchase-money—*continued.*

purchase-money. *Held* that he was entitled to a refund of the purchase-money. The purchaser who had obtained possession might or might not, according to the particular circumstances of the case, be liable to pay the vendor a reasonable amount for the occupation of the land; but when no set-off is pleaded, the vendor could only claim such amount by a separate action. COURT OF WARDS *v.* NITTA KALI DEBI . **3 B. L. R., A. C., 353 : 12 W. R., 287**

See GURU PRASAD ROY *v.* DHANPAT SINGH **[5 B. L. R., Ap., 46 : 14 W. R., 20**

PRABUHRAM HAZRA *v.* ROBINSON **[3 B. L. R., Ap., 49 : 11 W. R., 398**

118. ——— *Purchaser at revenue sale afterwards set aside.—Suit to recover purchase-money.—Voluntary payment.*—A person who, with notice, buys property subject to a contingency, which may defeat or destroy the interest which is the subject of the sale, is not entitled to be relieved from his bargain and to recover the purchase-money, merely because the contingency contemplated actually happens, and the property either does not become, or ceases to be, available for his benefit. RAMTUHUL SINGH *v.* BISSESSUR LAL SAHOO **[15 B. L. R., 208 : 23 W. R., 305 L. R., 2 I. A., 131**

Reversing the decision of the High Court in BISSESSUR LAL SAHOO *v.* RAMTUHUL SINGH **[11 B. L. R., 121 : 19 W. R., 351**

119. ——— **Voluntary payment.**—*Payment to prevent sale.*—A payment of money to prevent a sale about to be effected in execution of a decree cannot be called a voluntary payment, whether it is made by the judgment-debtor or by a third party claiming the property. OMRITO LALL SIRCAR *v.* RAMDHUN CHAKEE . . . **18 W. R., 503**

120. ——— *Payment by purchaser at execution sale.—Purchaser looking to application of money to pay debts on estate.*—A purchaser was held entitled to recover the amount paid by him on account of previous mortgages, when, in making these payments, he merely acted for the debtor who had borrowed the money from him, and what he did was to see that that money so borrowed was properly applied in clearing off the debts which rendered his own purchase unsafe, and of the existence of which he was at that time cognisant. WAJED HOSSEIN *v.* AHMED REZA **[17 W. R., 480**

121. ——— *Sale whilst under attachment.—Caveat emptor.—Fraud.*—*T.* sold a mouzah, of which he was owner, to *Z.* At the time of sale the mouzah was under attachment in execution of a decree obtained against *T.* by *R.* *Z.* paid the amount of that decree to prevent the property which she had purchased being sold in execution. *Z.* was

VENDOR AND PURCHASER—*continued.*

14. PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER—*continued.*

Voluntary payment—*continued.*

under no obligation otherwise to pay the amount of the decree. *Held* that *Z.* was entitled to recover against *T.* the amount so paid. ZAHURAN *v.* TAYLER [2 B. L. R., A. C., 86; 10 W. R., 880

122. ——— *Purchase from Hindu widow.—Alienation set aside by heir.—Suit by purchaser to recover money paid on mortgage.*—The plaintiff purchased an estate from a Hindu widow in possession, and after his purchase he paid a debt for which the property sold had been mortgaged by the late husband of his vendor. Subsequently the daughter of the vendor claimed the property as heir of her father, and recovered possession of it from the purchaser by suit. The purchaser then sued the heir for a refund of the amount of the mortgage-debt paid by him. *Held* that the purchaser was entitled to recover. PORAN MISRA *v.* HARSARAN MISRA . . . . 8 B. L. R., Ap., 55

15. PURCHASERS, RIGHTS OF—

123. ——— **Purchaser from Hindu executor.**—*Inquiry by purchaser.*—*Semble,*—A purchaser from a Hindu executor is not bound to see to the exact amount of the debts which the testator has directed the executor to pay, or even to inquire if any such debts actually existed; he need not look further than the will itself. ROOPLALL KHETTRY *v.* MOHIMA CHURN ROY . 10 B. L. R., 271, note

124. ——— **Specific performance, Right to.**—*Sale bonâ fide but not of final character.—Priority over attaching creditor.*—A deed of sale, though not strictly of a complete and final character, yet, if genuine and duly attested, may be sufficient to bind the property and to give the purchaser the right to demand a specific performance of the contract and the execution of such further assurances as might be deemed necessary to invest him with a complete title to the property. Such a deed would necessarily prevail over any intermediate attachment of the property for debts due from the original proprietor. LALLA CHOONEELAL NAGINDAS *v.* SAWAECHUND NAMEDAS [5 W. R., P. C., 111

125. ——— **Validity of sale.**—*Sale for valuable consideration.—Intention to transfer.*—*Held* that the mere fact that the sale to the plaintiff was instigated by some discharged mortgagee does not of necessity make void the plaintiff's right as purchaser, if it be found that the vendor to the plaintiff had some right or interest in the property by inheritance, and transferred it for valuable consideration, with the intention that it should take effect as a transfer of his rights as heir. MAHOMED FAIZALI KHAN *v.* GUNGA RAM . . . 1 Agra, 112

126. ——— *Conveyance by mortgagee with power of sale.—Absence of confirmation by mortgagor.*—*B. & Co.*, mortgagees with power to sell, sold the mortgaged property to the

VENDOR AND PURCHASER—*continued.*

15. PURCHASERS, RIGHTS OF—*continued.*

Validity of sale—*continued.*

defendants. No deed was executed until some years afterwards, when the mortgagor was dead. The deed was in the form followed when a mortgagee is the vendor, and the mortgagors join in the conveyance; but the words of conveyance were by the mortgagees alone, and without any confirmation by the mortgagor. *Held* that the purchaser did not by the deed acquire an indefeasable estate. DOUCETT *v.* WISE . . . . . 3 W. R., 157

127. ——— **Effect of sale.**—*Purchase of rights of Mahomedan widow.—Failure to take actual possession.*—By an order passed under Act XIX of 1841, *A.* was declared entitled to take possession of a fourth share of her deceased husband *B.'s* estate which devolved upon her according to Mahomedan law. *B.'s* nephew *C.* sued to recover this share on the ground that *A.* had been divorced and this suit was pending when the present suit was brought by the purchasers of *A.'s* rights. It being found that *A.* never took actual possession of her share under her decree and that *C.* was in possession of the whole estate,—*Held* that *A.'s* vendees could not be placed in a higher position than their vendor was when *C.'s* suit was brought against her, and all that they were entitled to was the right to represent her in the pending suit. MAHOMED GOWHUR ALI KHAN *v.* AZEEMOODDEEN. MAHOMED GOWHUR ALI KHAN *v.* GOOL BEGUM. MOHOMED GOWHUR ALI KHAN *v.* SHURUFUNISSA BEGUM . . . . . W. R., 1864, 93

128. ——— **Purchaser of fractional share of estate.**—*Right to cultivate land.—Rate of rent.*—In the absence of any reservation or restriction, the purchaser of a fraction of a share of an estate acquires a right either to cultivate a proportionate share of the lands cultivated by his vendors on the same conditions as to favourable rents as those under which they, as proprietors, cultivated it, or to claim his share of the rents of these lands just as he would from any ryot of the estate, but without any other sum as mesne profits. CHYTUN SINGH *v.* KAYESSUR KOONWUR . . . 5 W. R., 117

129. ——— **Specification of land sold.**—*Purchase of specified land with description of amount.*—A party who buys a specified talook with the additional description that that talook contains so much land, gets the whole land which the specification of his vendor covers and which was intended to be sold, although it may be more than was contained in the description. AMEEROONISSA KHATOON *v.* KUMOLA KANT ROY . . . 14 W. R., 117

130. ——— *Omission to specify area sold.—Misdescription.—Compensation for smaller area.*—The specification in a deed of sale of land of the area of the land sold *primâ facie* implies that the area was regarded as material by the parties, and, unless it is clear that the precise area was not regarded as material, proportional compensation will be awarded to the purchaser of land the real area of which is found to fall short of the area specified in

VENDOR AND PURCHASER—*continued.*

15. PURCHASERS, RIGHTS OF—*continued.*

Specification of land sold—*continued.*

the deed of sale. SULEMAN VADU *v.* TRIKAMJI VELJI . . . . . 12 Bom., 10.

131. ——— *Specification in sale certificate.—Sale by purchaser at execution sale who has obtained possession under a certificate of sale more extensive than the decree.*—Where a decree-holder obtains an order for the sale of his judgment-debtor's interest in certain property, and, becoming purchaser at the sale which follows, receives a sale certificate going beyond the order, he cannot avail himself of anything in the certificate beyond the order. If, however, he obtains possession according to the certificate, and sells to a *bonâ fide* purchaser without notice of the difference between the certificate and the order of sale, the latter has a good title. GOWREE KUMUL BHUTTACHARJEE *v.* SURUT CHUNDER DOSS BISWAS . . . 22 W. R., 408

132. ——— Non-registration, Effect of.—*Proof of actual contract of sale and possession on payment of purchase-money.—Held* that it does not follow from the non-registration within the time fixed for registration of a deed which was executed before the Registration Act came into operation, that the purchaser has acquired nothing by his purchase, or that the vendor is to resume possession of the property, if it be shown that there was a contract of sale, and that in pursuance of that contract the purchaser paid the money and obtained possession. RAM SURUN DASS *v.* RAM CHUND . 1 Agra, 283

133. ——— Non-registration.—*Sale of decree.—Decree on mortgage-bond.—Registration.—Right to execute decree.*—A decree-holder purported to sell to *A.*, by private sale, all his right, title, and interest in a mortgage-decree obtained by him in a suit on a mortgage-bond against the mortgagor. The deed of sale was not registered. Afterwards, by a registered deed of sale, *A.* conveyed all his right, title, and interest in the same decree to *B. Held* that the right to execute the decree as a mortgage-decree did not pass to *B.* KOOB LALL CHOWDHRY *v.* NITTYA NUND SINGH . . I. L. R., 9 Calc., 839

S. C. HUB LAL CHOWDHRY *v.* NITTYANUND SINGH . . . . 12 C. L. R., 393

134. ——— Assignment of indigo factory.—*Right to rent and to indigo manufactured.*—Where a plaintiff sued on the alleged purchase by him of the rights and interests of certain parties in an indigo concern, it was held that the rents collected and appropriated, and the indigo manufactured and taken away before the date of the purchase, could not form part of the stores and assets sold to the plaintiff, unless the sale of the assets, &c., had been as from some date prior to the date of purchase. CHUNDER COOMAR ROY *v.* WILKINS [10 W. R., 311

135. ——— *Assignee, Liability of, to creditor of the factory.—Creditor, Rights of.—Dena powna, Contract to take over*

VENDOR AND PURCHASER—*continued.*

15. PURCHASERS, RIGHTS OF—*continued.*

Assignment of indigo factory—*continued.*

—A., by deed duly registered, assigned his interest in an indigo factory to *B.* In the deed was a recital that it had been agreed that *B.* should take over the dena powna account of the factory as the same stood on the 30th September 1856. *C.* sued *A.* and *B.* jointly to recover rent in respect of lands which had been occupied under a lease from *C.* with and for the use of the factory, and which was due on the 30th September 1856. *B.* raised the defence that the debt was not included in a schedule, dated 30th September 1856, signed by *A.*, and which he alleged had been furnished to him by *A.* as containing a list of the liabilities of the factory. *Held*, if a trader or other person in this country assigns his stock in trade and effects to another, and such other person enters into a contract with the first to pay the debts of the concern, or a certain portion of such debts, the contract and assignment create a liability to the creditors in whose favour such contract is made, which they may enforce by suit; nor is the creditor bound to elect between his original debtor and the assignee, but he may join them as co-defendants in the same suit. *Held*, also, *per* PEACOCK, *C. J.*, and NORMAN and KEMP, *JJ.* (STEER and SETON-KARR, *JJ., dissenting*), the case must be remanded to the lower Court to try what was the agreement between *A.* and *B.* as to *B.* taking over the dena powna account of the factory, whether the schedule was an essential part of the contract or not. KEARNES *v.* BHAWANI CHARAN MITTER [B. L. R., Sup. Vol., 54: W. R., F. B., 167

PHOOL KOONWAR *v.* CHARDON [6 W. R., Act X, 89

136. ——— *Liability of assignee to creditor.—Bond given by former proprietor.*—When the holder of a bond from the former proprietor of an indigo factory had made no demand on it for twelve years, nor apprised the assignee of its existence as a debt due by the factory, it was held that he could not come down on the present proprietors, but must look to the obligor of the bond personally for satisfaction. HUBEEBUNISSA *v.* COX [W. R., 1864, 266

16. SETTING ASIDE SALES.

137. ——— Ground for setting aside sale.—*Stipulation to have mutation of names.—Refusal of revenue authorities to register name of purchaser.*—Where a person purchased certain lands under a deed of sale, in which the vendor undertook to apply to the revenue authorities for the transfer of the lands to the name of the vendee, and did so, and both persons clearly understood what they were doing,—*Held* that the refusal of the revenue authorities to enter the purchaser's name in the mutation register did not constitute a ground for cancelling the sale and recovering the purchase-money. GEDEERA KOLITA *v.* DEBENDRO NARAIN KONWAR [25 W. R., 352

VENDOR AND PURCHASER—*continued.*

16. SETTING ASIDE SALES—*continued.*

Ground for setting aside sale—*continued.*

138. ——— *Bonâ fide purchase from guardian of Hindu widow acting collusively.*—The plaintiff was entitled, in right of her deceased husband, to the equity of redemption in a mortgaged estate. Her guardian, in collusion with the mortgagee, instituted a foreclosure suit, in which she was represented by the guardian, who submitted to a decree; and under that decree the property was sold, and the defendant became the purchaser. *Held* that the defendant being a *bonâ fide* purchaser, the sale was not liable to be set aside. KHETERMONEE DASSEE *v.* KISHENMOHUN MITTER . **Marsh., 313**

S. C. SS EHEN MOHUN MITTER *v.* KHETTERMONEE DASSEE . . . . **2 Hay, 196**

17. VENDOR, RIGHTS AND LIABILITIES OF—

139. ——— **Unpaid vendor.**—*Refusal to deliver under payment.—Right after delivery.*—A party selling land may refuse to give delivery until the consideration is paid; but having given delivery, he has no right to retake possession and pay himself the purchase-money out of the usufruct. PREM SOONDUREE DOSSIA *v.* GEISH CHUNDER BHUTTACHARJEE . . . . . **10 W. R., 194**

140. ——— *Failure to pay whole of consideration-money.*—When a vendor of land is not paid a portion of the consideration-money, he cannot wholly disaffirm the contract, but he can establish his lien on the land as an unpaid vendor. MOHSUM ALLY *v.* BALASOO KOER . **2 Hay, 576**

141. ——— *Vendor's lien for unpaid purchase-money.*—In a suit claiming possession of land purchased by the plaintiff from the defendant, the Munsif threw out the claim for want of consideration; but the District Judge found that the plaintiff was entitled to have the land, and that the defendant might sue for the purchase-money. *Held* that the equitable doctrine of the vendor's lien for unpaid purchase-money applied to the case, but as the District Judge had not decided whether the defendant had succeeded in proving that the purchase-money had not been paid, the suit should be remanded for a finding by him on that issue. YELLAPPA BIN BISAPPA *v.* MANTAPPA BIN BASAPPA **[3 Bom., A. C., 102**

142. ——— *Failure to pay portion of purchase-money.*—The vendees of certain land, a portion of which only was in their possession by virtue of the sale, the rest being in the possession of mortgagees, sued for a declaration of their right to such land, and to have a sale of a portion of such land, made after it had been sold to them, set aside. *Held* that, inasmuch as the sale to them had taken effect, they were entitled, notwithstanding the whole of the purchase-money might not have been paid, to a decree as claimed, and the vendors, if they had any claim in respect of the purchase-money, should be

VENDOR AND PURCHASER—*continued.*

17. VENDOR, RIGHTS AND LIABILITIES OF—*continued.*

Unpaid vendor—*continued.*

left to seek their remedy. KESRI *v.* GANGA PRASAD . . . . . **I. L. R., 4 All., 168**

143. ——— *Stoppage in transitu.—Lien of unpaid vendors.—Agents for purchase of goods.—Insolvency.—Right of carriers.*—A firm at Cawnpore sent an agent to Sarun, plaintiff's residence, to effect purchases in cotton, and the plaintiff, at the instance of the person so deputed, made purchases and supplied funds, both for purchase and for their carriage and insurance, the agent doing nothing but consenting to the arrangements and giving hundis on his employer's correspondents in payment. The goods were despatched and insured, but before reaching their destination the firm became insolvent, and the plaintiff proceeded to take possession of them, but was prevented on account of the goods being previously attached by the defendant, a judgment-creditor. It was held on plaintiff's suit that the plaintiff was an unpaid vendor, and had a lien on the goods for the price, and might detain the goods till he received or was satisfied about the payment for the said goods, a completed contract for the sale of the goods notwithstanding. An unpaid vendor, in case of the vendee's insolvency, may stop the goods sold *in transitu*. Agents for the purchase of goods have a lien on the goods when purchased for the moneys paid and liabilities incurred by them in respect to such purchase, and are not bound to deliver the goods until they are reimbursed or secured for such advances and liabilities, and an agent in this character is in the position of an unpaid vendor. Where the vendor is not otherwise paid than by having received the insolvent's acceptance, he may in the event of the purchaser's insolvency stop the goods, though he have negotiated the bills, and they are still outstanding and not yet at maturity. Whilst the goods sold remain in the hands of the carrier employed to convey them to their original destination, as between buyer and seller, no case of constructive possession arises, unless when the carrier enters expressly into some new agreement, distinct from the original contract for carriage. So also the mere acts of making or sampling the goods, or giving notice to the carrier to hold the goods for the buyer, though done with intention to take possession, do not establish a constructive possession, or affect the right to stop *in transitu*. Where the right of stoppage *in transitu* vests in the consignor, it cannot be defeated by the claims of other creditors of the consignee, the unpaid vendor having an elder and preferential lien. BHOLANATH *v.* BAIJ NATH . . . **2 Agra, 11**

144. ——— *Sale of immoveable property.—Non-payment of purchase-money.—Vendor's remedy.*—A vendor of immoveable property who has given possession to the purchaser is not entitled to rescind the contract of sale and recover possession because the purchase-money is not paid. His remedy is to sue for the sum due, and he has a lien on the property for the amount. TRIMALRAV

VENDOR AND PURCHASER—*continued.*

17. VENDOR, RIGHTS AND LIABILITIES OF—*continued.*

Unpaid vendor—*continued.*

RAGHAVENDRA *v.* MUNICIPAL COMMISSIONERS OF HUBLI . . . . I. L. R., 3 Bom., 172

145. ——— *Lien.—Creditor of vendor, Right of, to lien.—Mortgage.*—Although an unpaid vendor holds a lien upon property sold for the consideration-money, yet a creditor of that vendor cannot claim the same right. HARI RAM *v.* DENAPUT SINGH

[I. L. R., 9 Calc., 167: 11 C. L. R., 339

146. ——— **Conditions of sale.**—*Sale by Government.—Auction sale of confiscated property.—Ground for setting aside sale.*—Where it was made a distinct condition of sale that the property should be sold to the highest bidder, without any restriction of the purchaser being a rebel or not, —*Held* that the Government may, like any other seller, impose any condition it pleases in reference to the property which it offers for sale, prior to sale, but is not at liberty subsequently to the sale to disaffirm or annul it on a ground not only novel but directly at variance with the terms on which it offered the property for sale. SEVA LALL *v.* MAHOMED . . . . . 2 Agra, 160

147. ——— **Vendor keeping vendee out of possession.**—*Suit for partition.—Trustee. —Mesne profits.*—Where, in a suit for partition, it appeared that the vendor of the portion sued for had kept the vendee out of possession, the vendor, though liable for mesne profits, was not in the position of trustee of the rents for the party kept out of possession. NILKAMAL LAHURI *v.* GUNOMANI DEBI

[7 B. L. R., P. C., 113: 15 W. R., P. C., 38

18. MISCELLANEOUS CASES.

148. ——— **Deed of sale, Proof of.**—*Suit for possession under deed of sale.—Delivery of deed of sale.*—In a suit for possession of land on the ground of title under a kobala, it is not enough for the plaintiff to prove the writing and signature of the kobala; he must also prove that it was delivered as a complete instrument. OMED ALI *v.* NIDHEE RAM . . . . . 22 W. R., 367

149. ——— **Fictitious sale.**—*Mortgage. —Suit by purchaser for confirmation of possession. —Issues.*—Where a sale by *A.* to the plaintiff had taken place shortly before a mortgage of the same property by *A.* to the defendant, the defendant is entitled to have raised, in a suit brought for confirmation of possession and to declare the sale valid, an issue whether the sale was *bonâ fide* and for consideration, and whether possession passed under it to the plaintiff. The proper issue is not whether the deed of sale was genuine or not. GARBHU BHAGAT *v.* RUNGLAL SING . . 7 B. L. R., Ap., 33

150. ——— **Owner standing by and seeing property sold.**—*Right to have sale set aside.*—The rule that one who, knowing his own title, stands by and encourages a purchase of property as another's, will not be allowed to dispute the validity of the sale, implies a wilful misleading of the purchaser by some breach of duty on the owner's part. In this case there was nothing more than mere quiescence. BASWANTAPA SHIDAPA *v.* RANU

[I. L. R., 9 Bom., 86

151. ——— **Purchaser from husband.** —*Acquiescence of wife.—Suit to set aside purchase as being wife's property.*—Where a husband was alleged to have given a share in some property to his wife, and the husband subsequently sold the whole property to another party, and put the said party in possession, without any objection from the wife, who for years behaved as though she had no interest in the property other than that arising from her husband's possession of it in his own right,—*Held* that a person afterwards claiming to have purchased the wife's share, and seeking to be put in possession, could not displace the *bonâ fide* purchaser from the husband, for a person in the position of the wife in this case, who chooses to stand by for years not asserting her rights, but allowing another to deal with her property as his own, has no equity to come into Court and eject any one who has purchased in ignorance of her title. SOOJAT MAHOMED *v.* MAHOMED TORAB . . . . . 25 W. R., 281

152. ——— **Grant of estate when having bad title.**—*Vendor afterwards obtaining good title.—Specific Relief Act (I of 1877), s. 18.—A.* holding a certain mehal as a ghatwal, mortgaged it to *B.* by way of a zur-i-peshgi lease for twenty-one years. Shortly after the granting of the lease the zemindar got a decree against *A.* by which *A.'s* ghatwali right was extinguished. In execution of that decree, the zemindar ousted and took khas possession of the mehal. Some years afterwards, the zemindar granted to *A.* a perpetual mokurrari lease of the same mehal. *Held*, in a suit against *A.* instituted by the assignee of *B.'s* rights in the zur-i-peshgi, that under section 18, Act I of 1877, *A.* must, out of his present estate in the mehal, make good the zur-i-peshgi. LOOT NARAIN SINGH *v.* SHOWKEE LALL

[2 C. L. R., 382

153. ——— **Separate agreement by purchaser.**—*Subsequent exercise of pre-emption.— Co-sharers.*—Where a vendor in selling his property got the vendee to execute another deed in his favour for certain bighas of land for his maintenance, and subsequently, on the completion of the bargain, a co-sharer took that property by right of pre-emption,—*Held* that the agreement, being in fact a part of the consideration for sale and *bonâ fide*, was binding on the pre-emptor, who could not claim to have the bargain made with him on more favourable terms than those offered by the stranger and accepted by the vendor, the fact that he was no party personally to the agreement notwithstanding. KHAIT SINGH *v.* HEERA DASS . . . . 1 Agra, 75

VENDOR AND PURCHASER—*continued.*

18. MISCELLANEOUS CASES—*continued.*

154. ——— Right of pre-emption.—*Option of getting estate re-transferred.—Mortgage.*—In July 1870, *R.*, the owner of a share of a village, executed in favour of *M.* an instrument whereby he transferred by sale the share to *M.* absolutely. In November 1870 *M.* agreed to re-transfer the share to *R.*, if *R.* desired, at any time within thirteen years, to re-purchase it, on payment of the sum which *M.* had paid for it. During the term mentioned in the agreement of November 1870, *R.* not having taken advantage of the agreement, *M.* sued, as owner of the share, to enforce the right of pre-emption in respect of the sale of another share of the village. *Held* that, *M.* having become under the transfer of July 1870 the out-and-out proprietor of the share, until *R.* availed himself of the option given him by the agreement of November 1870, the full estate of an owner, carrying with it the right of pre-emption, vested in *M.*, and it was competent for him to enforce such right by suit. *Ramsaran Lal* v. *Amirta Kuar*, *I. L. R., 3 All., 369*, distinguished. BHAJAN *v.* MUSHTAK AHMAD . . **I. L. R., 5 All., 324**

155. ——— *Condition against alienation.*—The co-sharers of a certain estate sold it to *R.* On the same day as the vendors executed the conveyance of such estate to *R.*, the latter executed an instrument whereby he agreed that the vendors might redeem such estate or any portion thereof, within a certain term, on repayment of the purchase-money or a proportionate share thereof, and in such case the sale would be considered cancelled; provided that the vendors paid the money out of their own pockets and did not raise it by a transfer of the property, and not otherwise. The heir of one of the vendors sold his share of such estate to *A.*, and *A.* sued *R.* to redeem such share. *Held* by the Full Bench (STUART, *C. J.*, doubting) that the nature of the transaction between *R.* and his vendors must be determined by looking at both the conveyance and the agreement, and, both those documents being regarded, the transaction between them was one of mortgage, and the vendors had a right of redemption, and the proviso in the agreement was inequitable and incapable of enforcement against them or their representatives in title. *Held*, also, by PEARSON, *J.*, that the agreement was not of the nature of a personal contract enforceable only by the original vendors and not by their representatives; that, assuming that a transfer of the property was prohibited by the agreement, *R.* could not, as implied by the Full Bench ruling in *Dookhchore Rai* v. *Hidayut-oollah*, *Agra, F. B., Ed. 1874, 5*, treat as a nullity the sale which had been made to *A.*, and *A.'s* right to redeem could not be reasonably denied and resisted; and that a transfer was not positively but only implicitly prohibited by the agreement, *R.* merely declaring that he would not recognise the transferees as having acquired the equity of redemption or cancel his own sale-deed, and such a declaration was beyond his competence and had no legal effect. RAM SARAN LAL *v.* AMIRTA KUAR . **[I. L. R., 3 All., 369**

VERBAL CONTRACT.

See LIMITATION ACT, 1877, ART. 75.
[I. L. R., 3 Calc., 619

VERDICT OF CRIMINAL COURT.

See EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—CRIMINAL COURT, PROCEEDINGS IN—
[3 B. L. R., Ap., 2
2 B. L. R., A. C., 31
10 W. R., 56
9 W. R., 77
14 W. R., 493
11 W. R., 171

See CASES UNDER RES JUDICATA—COMPETENT COURT—CRIMINAL COURTS.

VERDICT OF JURY.

Col.
1. GENERAL CASES 6160
2. POWER TO INTERFERE WITH VERDICTS 6163

See REFERENCE TO HIGH COURT—CRIMINAL CASES.
[I. L. R., 10 Bom., 497

See CASES UNDER REVISION—CRIMINAL CASES—VERDICT OF JURY AND MISDIRECTION.

1. GENERAL CASES.

1. ——— Verdict of majority.—*Want of independent opinion.*—The law requires a juryman to exercise his own understanding on the case submitted to him, and to decide on evidence, and not to follow blindly the opinion of his fellows. Where one out of three (in a jury of five) depends on the inspection and inquiries of the other two, the verdict of the three is not that of a legal majority. PETAMBUR JUGI *v.* NASARUDDY . . **25 W. R., Cr., 4**

2. ——— Ground for refusing to accept verdict.—*Verdict based on voluntary confessions.*—Wherever trial by jury exists, the verdict of the jury must be accepted, unless it is manifestly and certainly wrong. A verdict based on voluntary confessions is just as good as a verdict based on the testimony of credible witnesses. It is the province of a jury to decide as to the credibility of witnesses. QUEEN *v.* WUZIR MUNDUL . **25 W. R., Cr., 25**

3. ——— Unanimous verdict.—*Further consideration of case by jury.—Dissent by Judge from unanimous verdict.—Procedure.*—It is only in a case where the jury are not unanimous that a Court may require them to retire for further consideration. Where a verdict is unanimous, it must be received by the Judge, unless contrary to law. Where a Judge dissents from the unanimous finding of a jury given in accordance with the law, the only procedure open to him to follow is that laid down in the fifth clause of section 263 of the Code of Criminal Procedure. GOVERNMENT OF BENGAL *v.* MAHADDI . . . . **I. L. R., 5 Calc., 871**

S. C. EMPRESS *v.* MAHUDDI . **6 C. L. R., 349**

VERDICT OF JURY—*continued.*

1. GENERAL CASES—*continued.*

4. ——— Dissent from verdict.—*Criminal Procedure Code, 1872, s. 263, cl. 4.*—The "dissent" referred to in the 4th clause of section 263 of the Criminal Procedure Code (Act X of 1872) must be such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court. EMPRESS *v.* BHAWANI . . . **I. L. R., 2 Bom., 525**

5. ——— *Reference to High Court.—Statement by Judge of offence committed.—Criminal Procedure Code, 1872, ss. 263, 464.*—It is the duty of a Judge in sending up a case to the High Court under sections 263 and 464 of the Criminal Procedure Code, 1872, when he disagrees with a verdict of acquittal, to state the offence which, in his opinion, has been committed. EMPRESS *v.* SAHAE RAE **[I. L. R., 3 Calc., 623 : 2 C. L. R., 304**

6. ——— Questioning jury as to their verdict.—*Questions to member of jury as to reasons for verdict.*—A Judge ought not to put questions to any of the jury as to his reasons for the verdict he has given. QUEEN *v.* MEAJAN SHEIKH . . . . **20 W. R., Cr., 50**

7. ——— *Questions as to grounds for verdict.—Power of Sessions Judge.*—*Per* GARTH, *C. J.*, and PRINSEP, *J.* (MARKBY, *J. contra*).—The rule laid down in *Queen* v. *Wuzir Mandal, 25 W. R., Cr., 25,* goes too far. PRINSEP, *J.* (MARKBY, *J., contra*).—The law does not prevent a Sessions Judge from asking a jury regarding the grounds for their verdict, and such a course is desirable in the ends of justice. See *Queen* v. *Sustiram Mundul, 21 W. R., Cr., 1.* EMPRESS *v.* MUKHUN KUMAR . . . . . **1 C. L. R., 275**

8. ——— *Ambiguity in verdict.—Criminal Procedure Code, 1872, s. 263.*—Under section 263 of the Code of Criminal Procedure, 1872, a Court was authorised to ask the jury such questions as were necessary to ascertain what their verdict really is; but where the verdict, although perhaps erroneous, is not ambiguous, it is the duty of the Judge to record it without further question. IN THE MATTER OF DHUNUM KAZEE. EMPRESS *v.* DHUNUM KAZEE . **I. L. R., 9 Calc., 53 : 11 C. L. R., 169**

9. ——— *Criminal Procedure Code, 1882, s. 303.*—Although section 303 of the Criminal Procedure Code empowers a Judge to ask the jury such questions as are necessary to ascertain what their verdict is, it was never contemplated that, on ascertaining that the jury are not unanimous, the Judge should make minute inquiries to learn the nature of the majority and its opinion, so that he should have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own opinion or not. Whatever may be the opinion of the Judge, if he goes so far as to ask the jury what is the exact majority, and what is the opinion of the majority, he ought to receive that verdict without hesitation, and if he differs from it he should proceed as directed by section 307. HURRY CHURN CHUCKERBUTTY *v.* EMPRESS **[I. L. R., 10 Calc., 140 : 13 C. L. R., 358**

VERDICT OF JURY—*continued.*

1. GENERAL CASES—*continued.*

Questioning jury as to their verdict—*continued.*

10. ——— *Criminal Procedure Code, 1872, s. 263.*—In a case in which the accused was tried on charges of murder, culpable homicide, and causing grievous hurt, the jury acquitted him of murder, but convicted him on the other counts. This verdict was recorded by the Sessions Judge, who then, in accordance with section 263, Criminal Procedure Code, 1872, questioned the jury as to the grounds for their verdict, and the jury eventually intimated their willingness to convict of murder. The Sessions Judge differed from the first verdict of the jury, but as he had recorded that verdict, he doubted whether he could accept the second verdict, and referred the case to the High Court under section 263. *Held* that section 263 did not apply to such a case as this. There could be no verdict delivered, and no verdict finally recorded, until the last of the questions put by the Judge to the jury was answered; and as it appeared from the answers of the jury that their findings of facts disclosed that the verdict ought to have been one of guilty on the charge of murder, the Judge should have entered the verdict of the jury as one of guilty of murder. The case was accordingly returned to the Judge to enable him to do that, and to pass such sentence as the law directed. It is only when it is necessary, in order to ascertain what the verdict of a jury really is, that a Judge is justified under section 263 in putting questions to the jury. QUEEN *v.* SUSTIRAM MANDAL . . **21 W. R., Cr., 1**

11. ——— *Special verdict.—Question put by Judge to jury after special verdict.—Penal Code, s. 330.*—The prisoners were tried under section 330 of the Penal Code (for voluntarily causing hurt to a girl), and under section 348 (for wrongfully confining her). Circumstances of aggravation were alleged, as lifting up and using a sword, of lowering the girl into a well, and of pricking her with thorns. The jury in their verdict stated that they disbelieved these allegations, and also the charge of illegal confinement, but that they believed that some slaps had been given. The Judge then asked the jury whether they convicted on either, and if so, which head of charge. They answered that they believed the prisoners had beaten the girl, and that they convicted them under section 330. *Held* that the question put by the Judge to the jury was a proper one, and not one of law. The conviction upheld. Such a case is not governed by the rules of English law as to special verdicts. QUEEN *v.* HARI PROSAD GANGOOLY **[8 B. L. R., 557 : 14 W. R., Cr., 59**

12. ——— Form of verdict.—*Culpable homicide.—Murder.—Illegal finding.*—The finding of a jury that, although the accused killed the deceased, the crime was not murder because the accused

VERDICT OF JURY—*continued.*

1. GENERAL CASES—*continued.*

Form of verdict—*continued.*

had no object in killing him, is not a legal finding, and does not amount to a conviction of culpable homicide not amounting to murder. QUEEN *v.* UCKOOR GHOSE . . . . 1 W. R., Cr., 50

13. ——— *Penal Code, ss. 322 and 335.—Verdict of guilty under section not in charge.—Grievous hurt with provocation.*—Where a prisoner was charged under the Penal Code, sections 304, 325, and 323, and the jury brought in a verdict of guilty under section 335,—*Held* that he was not acquitted of grievous hurt, but found guilty of the offence described in section 322 with the extenuating circumstance which would confine the punishment within the limits specified in section 335. QUEEN *v.* LUKHINARAIN AGOORI. . 23 W. R., Cr., 61

14. ——— *Offence proved, though not independently charged.—Code of Criminal Procedure (Act X of 1872), s. 457.—Penal Code (Act XLV of 1860), ss. 149, 325.*—The accused were charged under section 149, coupled with section 325, of the Penal Code, with, while being members of an unlawful assembly, committing grievous hurt. The jury disbelieved the evidence as to the unlawful assembly, but unanimously found two of the accused guilty of grievous hurt under section 325. *Held* that such verdict was, under section 457 of the Code of Criminal Procedure, legally sustainable, although that offence did not form the subject of a separate charge. Section 457 enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence. GOVERNMENT OF BENGAL *v.* MAHADDI . . . . I. L. R., 5 Calc., 871

S. C. EMPRESS v. MAHUDDI. 6 C. L. R., 349

15. ——— Objections to verdict.—*Ground for thinking verdict erroneous.*—Where a party objects to the verdict of a jury, he ought to give the Magistrate reasonable *primâ facie* ground for the opinion either that the jury did not in fact apply a judicial discretion to the case, or that the verdict was such as the jury could not have arrived at by a proper exercise of their discretion upon the materials before them. BINDABUN CHUNDER DUTT *v.* DWARKA NATH SEN . 23 W. R., Cr., 15

2. POWER TO INTERFERE WITH VERDICTS.

16. ——— General principle regulating interference.—*English law.—Position of Judge in India.—Criminal Procedure Code, 1872, s. 263.*—The Code of Criminal Procedure, section 263, casts upon the High Court the duty both of Judge and jury; but, notwithstanding this difference, which clothes it with greater powers and responsibilities than the superior Courts in England, it will, as far as may be, be guided by the principle of English law, that the verdict of a jury will not be set aside unless it be perverse and patently wrong, or may have been induced by an error of the Judge. In a proper

VERDICT OF JURY—*continued.*

2. POWER TO INTERFERE WITH VERDICTS—*continued.*

General principle regulating interference.—*continued.*

case, however, the High Court will rectify the verdict of a jury. REG. *v.* KHANDERAV BAJIRAV [I. L. R., 1 Bom., 10

17. ——— *English law.—Acquittal by jury.—Disagreement by Judge.—Criminal Procedure Code (Act X of 1872) s. 263.*—Notwithstanding the large discretionary powers vested in the High Court under section 263 of Act X of 1872, the Court will adhere generally to the principle of the Courts in England,—*viz.*, that the Court will not set aside the verdict of a jury unless it be perverse and patently wrong, or may have been induced by the error of the Judge; and when the Court is asked to do so on the ground that the verdict is against the weight of evidence, the question is, not whether the learned Judge who tried the case was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to. IN THE MATTER OF DHUNUM KAZEE. EMPRESS *v.* DHUNUM KAZEE [I. L. R., 9 Calc., 53 : 11 C. L. R., 169

18. ——— *Exercise of powers of High Court.—Criminal Procedure Code, 1872, s. 263.*—The Court should exercise the powers vested in it by section 263 of the Criminal Procedure Code (X of 1872) only when it finds the verdict of the jury clearly and patently wrong, and only set such verdict aside, even if the Sessions Judge disagrees with it, when it is found unsustainable by the evidence. QUEEN *v.* SHAM BAGDI. [13 B. L. R., Ap., 19 : 20 W. R., Cr., 78

QUEEN *v.* NOBIN CHUNDER BANERJEE [13 B. L. R., Ap., 20 : 20 W. R., Cr., 70

QUEEN *v.* ISWARYA . 14 B. L. R., Ap., 1

QUEEN *v.* HURRO MANJI [14 B. L. R., Ap., 2, note : 21 W. R., Cr., 4

19. ——— *Inconsistencies in evidence otherwise sufficient for conviction.—Criminal Procedure Code, 1872, s, 263.*—Where there are reasons sufficient to warrant a jury in disbelieving the witnesses and in giving the prisoner the benefit of the doubt raised by inconsistencies in that evidence, although another jury might have come to a different conclusion, the High Court will not interfere. It must be shown that the verdict of the jury is certainly unreasonable and perverse. *Queen* v. *Sham Bagdi, 13 B. L. R., Ap., 19 : 20 W. R., 73,* cited and followed. IN THE MATTER OF HURREE NARAIN MOOKERJEA . . . . 2 C. L. R., 518

20. ——— Exercise of power of interference.—*Ground for setting aside verdict.—Verdict contrary to Judge's charge to jury.*—Where a jury convicted a prisoner contrary to the charge of the Sessions Judge, which charge was held by the High Court to have been a proper charge, the High

VERDICT OF JURY—*continued.*

2. POWER TO INTERFERE WITH VERDICTS—*continued.*

Exercise of power of interference—*continued.*

Court refused to interfere, although it concurred with the Sessions Judge in thinking that the verdict of the jury was not correct. The case was one in which an application could be made to the Government; but as regards the Court the petitions were rejected. QUEEN *v.* NIDHEERAM BAGDEE . **18 W. R., Cr., 45**

Contra, QUEEN *v.* SHIB CHUNDER MUNDLE **[18 W. R., Cr., 46**

21. ——— *Omission to sum up properly.—Ground for setting aside verdict.*—The omission of the Judge to sum up the case properly to the jury is an error in law sufficient to justify the setting aside of the verdict. No general rule can be laid down as to when a prisoner is prejudiced by a defective summing up, but in general, if the finding of the jury in such a case is one that an Appeal Court would set aside if the trial had taken place with assessors, the Court will interfere and set the verdict aside. REG. *v.* FATTECHAND VASTACHAND **[5 Bom., Cr., 85**

22. ——— *Criminal Procedure Code, 1872, s. 263.—Ground for setting aside verdict.—Misdirection.*—The High Court set aside the verdict of a jury in this case, because the Judge in his direction to the jury omitted to point out the absence of evidence very material to the case of the prosecution, and because he directed the jury to attribute an undue importance to the statements or excuses made by the prisoner in the explanation of certain documents. QUEEN *v.* GUNGA GOVIND PALIT **[23 W. R., Cr., 21**

23. ——— *Inconsistent verdict.—Verdict of guilty.*—Where a jury found an accused person guilty of murder, but refused to convict him because there had been no eye-witness of his crime, and on a second charge from the Judge refused to find him guilty at all,—*Held* by the High Court, to whom the case was referred, that the Judge ought to have explained to the jury that the testimony of eye-witnesses was not necessary to the establishment of a charge of murder, and that the jury, if they had no doubt of the guilt of the accused, were bound to give effect to the conclusion at which they had arrived. QUEEN *v.* GOKOOL KAHAR **[25 W. R., Cr., 36**

24. ——— *Criminal Procedure Code, 1872, s. 263.—Discretion of Court.—Setting aside verdict of acquittal of murder.*—A very large discretionary power is vested in the High Court by section 263 of the Code of Criminal Procedure. No fixed rules can be laid down for the exercise of that discretion in every instance, and the decision in each case submitted must depend upon its own peculiar circumstances. In this case the Court set aside a verdict of acquittal of murder. EMPRESS *v.* MUKHUN KUMAR . **1 C. L. R., 275**

VERDICT OF JURY—*continued.*

2. POWER TO INTERFERE WITH VERDICTS—*continued.*

Exercise of power of interference—*continued.*

25. ——— *Judge disagreeing with verdict.—Criminal Procedure Code, 1872, s. 263.—Ground for setting aside verdict.*—On a trial by jury before a Sessions Judge, the jury returned a verdict of guilty. The Judge disagreed with the verdict, and submitted the case to the High Court. *Held* that the High Court had power to set aside the verdict of the jury, and to direct an acquittal. Section 263 of the Criminal Procedure Code (Act X of 1872) explained. QUEEN *v.* KOONJO LETH **[11 B. L. R., 14: 20 W. R., Cr., 1**

26. ——— *Judge differing from verdict.—Acquittal by majority of jury.—Criminal Procedure Code, 1872, s. 263.*—Where a jury are not unanimous in their finding, and the Judge dissents from the opinions expressed by them, on the case being referred under section 263 of Act X of 1872, the High Court is competent to find the prisoner guilty, notwithstanding an acquittal by the majority of the jury. EMPRESS *v.* SAHAE RAI **[I. L. R., 3 Calc., 623: 2 C. L. R., 304**

27. ——— *Criminal Procedure Code, 1872, s. 263.—Verdict of acquittal.—Power to reverse verdict of acquittal.*—Where the jury acquitted the prisoners on the charges framed, but found certain facts which amounted to another offence, and omitted to convict the prisoners of that offence, as provided by section 457 of the Criminal Procedure Code,—*Held* that the High Court could, on the case coming before them under section 263 of the Criminal Procedure Code, find the prisoners guilty of such offence. EMPRESS *v.* HARAI MIRDHA **[I. L. R., 3 Calc., 189**

28. ——— *Criminal Procedure Code, 1872, s. 263.—Acquittal by jury.*—The High Court, acting under section 263 of the Criminal Procedure Code, 1872, convicted the accused in this case on the facts, notwithstanding the verdict of acquittal come to by the jury. QUEEN *v.* SIDHAM SIRCAR . . . . **20 W. R., Cr., 16**

29. ——— *Criminal Procedure Code, 1872, s. 263.—Acquittal by jury.—Confession.—Evidence Act, s. 29.*—The Court on a consideration of the evidence set aside the verdict of acquittal come to by a majority of the jury, holding that a confession made by the accused before the Assistant Magistrate was good, such confession, even if obtained by deception, being admissible under section 29 of the Evidence Act, 1872. QUEEN *v.* RAM CHURN GHOSE . . **20 W. R., Cr., 33**

30. ——— *Criminal Procedure Code, 1872, s. 263.—Acquittal by jury.*—The prisoner, who was charged with having committed murder, was found by the jury who tried him to have been of unsound mind at the time he committed the offence. The Sessions Judge differing on that point from the jury referred the case to the High Court

VERDICT OF JURY—*continued.*

2. POWER TO INTERFERE WITH VERDICTS—*continued.*

Exercise of power of interference—*continued.*

under section 263 of the Code of Criminal Procedure. *Held* that in a case of this kind the High Court will not interfere without the very clearest proof that the jury were mistaken, and that the interests of justice imperatively required the Court to take action under the extraordinary powers conferred upon it by section 263, Code of Criminal Procedure. On a consideration of the medical evidence, the Court declined to interfere with the verdict of acquittal which the jury came to. QUEEN *v.* DOORJODHUN SHAMONTO *alias* DEEJOBOR . . . **19 W. R., Cr., 45**

31. ——— *Verdict of acquittal by jury.—Criminal Procedure Code, 1872, s. 263.—Judge disagreeing from verdict of majority.* —A majority of the jurors (four out of five) acquitted the prisoner on a charge of attempt to commit rape. The Sessions Judge disagreed with that verdict, and referred the case to the High Court under section 263 of the Code of Criminal Procedure, because in his opinion the offence charged was proved. The High Court found that the evidence for the prosecution was fully worthy of belief and consistent with probabilities, and sentenced the prisoner. IN THE MATTER OF TILUCKDHAREE **[2 C. L. R., 1**

32. ——— *Criminal Procedure Code, 1872, s. 263.—Interference with verdict of majority of jury where Sessions Judge differed.*— The Sessions Judge, differing from a majority of the jury, who acquitted the accused, referred the case to the High Court under section 263 of the Criminal Procedure Code, 1872, to be dealt with as an appeal. Before proceeding with the case, the High Court considered it fair to the accused to give him notice to bring forward any objections he might have to the Sessions Judge's recommendation. On a consideration of the evidence, the High Court convicted the accused of the offence with which he had been charged in the Court below. QUEEN *v.* OOTTUM DHOBA **[19 W. R., Cr., 38**

33. ——— *Criminal Procedure Code, 1872, s. 263.—Differing from verdict of acquittal by jury.*—Where the Sessions Judge did not consider a confession to have been induced by illegal pressure, the High Court, upon a reference under section 263 of the Code of Criminal Procedure, held it to have been properly admitted, and finding it to be full and clear, and supported by reliable evidence, acted upon it by convicting the person who made it, notwithstanding his retraction of it in the Court of Session, and his being found not guilty by the jury. REG. *v.* BALVANT V. PENDHARKAR **[11 Bom., 137**

34. ——— *Criminal Procedure Code, 1872, s. 263.—Trial on different charges.—Discharge on some charges on which jury and Sessions Judge agree.—Reference of whole case to High Court.* —In a case in which the accused were charged with

VERDICT OF JURY—*continued.*

2. POWER TO INTERFERE WITH VERDICTS—*continued.*

Exercise of power of interference—*continued.*

murder (section 302, Penal Code), culpable homicide not amounting to murder (section 304), and voluntarily causing grievous hurt (section 325), the Sessions Judge at the trial added a further charge of housebreaking by night in order to the commission of an offence (section 457). The jury unanimously acquitted the prisoners of the three original charges, and a majority of the jury (four out of five) acquitted them also of the last charge. The Sessions Judge agreed with the verdict of the jury as regarded the three original charges, and recorded a formal order acquitting and discharging the prisoners on these three charges. He differed from the majority as to the fourth charge, and referred the case to the High Court under section 263 of the Criminal Procedure Code. *Held* that where (as in this case) the Sessions Judge had approved of a verdict on certain charges, and finally acquitted and discharged the accused as to these charges, the High Court could not under section 263 convict on the facts on these very charges. That section seems to contemplate only a case in which, without recording any order of acquittal or conviction, the Sessions Judge refers the whole case. As there was nothing in this case to show on what grounds the majority of the jury acquitted the prisoners on the additional charge, and as the Sessions Judge agreed with the unanimous verdict as to the three original charges, the High Court presumed that the reason which weighed with the majority of the jury in finding the prisoners not guilty on the additional charge must have weighed with the whole jury in finding them not guilty on all the three other charges, and accordingly the Court could not set aside the verdict of the majority on the last count, without practically finding directly in the teeth of the verdict of the unanimous jury on the first three counts. QUEEN *v.* UDYA CHANGA **[20 W. R., Cr., 73**

35. ——— *Verdict in accordance with charge.—Verdict disagreed with by Judge.—Penal Code, ss. 302, 304, 325.—Reference under s. 307, Act X of 1882.*—A prisoner was charged under sections 302 and 304 of the Penal Code, and the Judge at the trial added a further charge under section 325. The Judge in his charge to the jury directed them that in the event of their finding the charges under sections 302 and 304 unsustainable, they might find the prisoner guilty under section 325. The jury unanimously acquitted the prisoner on the charge framed under section 302, and a majority of them acquitted him on the charge framed under section 304; but a majority of them found him guilty on the charge framed under section 325. The Judge disagreed with their finding as regarded the charge framed under section 304, and referred the case to the High Court under section 307 of the Criminal Procedure Code. The High Court refused to interfere with the verdict, on the ground that the verdict could not be said to be manifestly erroneous, the Judge having heard the evidence and having expressed his

VERDICT OF JURY—*continued.*

2. POWER TO INTERFERE WITH VERDICTS—*continued.*

Exercise of power of interference—*continued.*

opinion to the jury that they might find the prisoner guilty under section 325. QUEEN-EMPRESS *v.* JACQUIET . . . . I. L. R., 11 Calc., 85

36. ———— *Criminal Procedure Code, 1882, s. 269.—Jury wrongly treated as assessors by Judge.—Unanimous opinion of jury treated as assessors accepted as formal verdict.—L.* and *N.* were tried by a Sessions Court on charges of dacoity and murder. The jury returned a verdict of guilty on both charges. The Judge, contrary to the provisions of section 269 of the Code of Criminal Procedure, treated the jury as assessors in respect of the charge of murder, and, convicting *L.* and *N.* of dacoity, acquitted them of murder. *Held* that the irregular procedure of the Judge could not deprive the verdict of the jury of its proper legal effect. QUEEN-EMPRESS *v.* LAKSHMANA . I. L. R., 9 Mad., 42

VESTED INTERESTS.

See CASES UNDER HINDU LAW—WILL—CONSTRUCTION OF WILLS — SPECIAL CASES OF CONSTRUCTION—VESTED AND CONTINGENT INTERESTS.

See SUCCESSION ACT, S. 98.
[I. L. R., 4 Calc., 304

See WILL—CONSTRUCTION.
[I. L. R., 4 Calc., 304

VESTING ORDER.

See CASES UNDER INSOLVENCY—CLAIMS OF ATTACHING CREDITORS AND OFFICIAL ASSIGNEE.

See INSOLVENT ACT, S. 7.
[5 B. L. R., 309
2 Bom., 150: 2nd Ed., 147
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11 C. L. R., 389
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I. L. R., 8 Mad., 554
I. L. R., 7 Bom., 438

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See MAHOMEDAN LAW—PRE-EMPTION—RIGHT OF PRE-EMPTION—CO-SHARERS.
[2 B. L. R., A. C., 63, 330
6 B. L. R., 41
14 W. R., 266
8 W. R., 2, 413
2 N. W., 100, 257
2 W. R., 261
9 W. R., 455

VILLAGE ACCOUNTANT.

See CRIMINAL PROCEDURE CODE, 1882, S. 45 (1872, S. 90).
[I. L. R., 1 Mad., 266

VILLAGE CATTLE.

See PASTURAGE, RIGHT TO—
[I. L. R., 2 Bom., 110

VILLAGE CHOWKIDAR.

See BENGAL REGULATION XX OF 1817, S. 21 . . . 18 W. R., 298

VILLAGE MUNSIF.

See MUNSIF . I. L. R., 7 Mad., 220
[I. L. R., 8 Mad., 500
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VILLAGE MUNSIF'S PEON.

See CRIMINAL PROCEDURE CODE, 1882, S. (45 1872, S. 90).
[I. L. R., 1 Mad., 266

VOLUNTARY ASSIGNMENT.

See CASES UNDER INSOLVENCY—VOLUNTARY CONVEYANCES.

VOLUNTARY CONVEYANCE.

See CONTRACT ACT, S. 25.
[I. L. R., 2 All., 891

See CASES UNDER DEBTOR AND CREDITOR.

See CASES UNDER INSOLVENCY—VOLUNTARY CONVEYANCES.

See INSOLVENT ACT, S. 26.
[I. L. R., 3 Calc., 434

———— Subsequent sale for value.—*Avoidance of gift or settlement voluntarily made.—Stat. 27 Eliz., c. 4.*—Where a person who has made a voluntary gift or settlement of an estate sells the same to another for value, the conveyance operates as a conveyance of the estate which the settlor had before the voluntary settlement, the Statute 27 Elizabeth, Cap. 4, putting the settlement out of the way, so that it shall not affect the conveyance which is made to the purchaser: words showing an intention on the part of the person who made the voluntary gift to convey to the purchaser all the interest or estate that he had, are sufficient to avoid such gift. JUDAH *v.* ABDOOL KUREEM
[22 W. R., 60

VOLUNTARY PAYMENT.

See CASES UNDER CONTRACT ACT, SS. 69 AND 70.

See CONTRACT ACT, S. 72.
[I. L. R., 7 Calc., 573

See CASES UNDER CONTRIBUTION, SUIT FOR—VOLUNTARY PAYMENTS.

See MONEY HAD AND RECEIVED.
[8 B. L. R., 418
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3 N. W., 162
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See MONEY PAID . . 7 N. W., 154
[10 W. R., 400

VOLUNTARY PAYMENT—*continued.*

See MONEY PAID UNDER PROCESS OF DECREE . . I. L. R., 7 Mad., 586

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See CASES UNDER SALE FOR ARREARS OF REVENUE—DEPOSIT TO STAY SALE.

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE — RIGHTS OF PURCHASERS — RECOVERY OF PURCHASE-MONEY . . 11 B. L. R., 121
[15 B. L. R., 208

See VENDOR AND PURCHASER—PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER . . 2 B. L. R., A. C., 86
[11 B. L. R., 121
15 B. L. R., 208
18 W. R., 503
17 W. R., 480
8 B. L. R., Ap., 55

VOLUNTARY SETTLEMENT, BREACH OF COVENANTS IN—

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WAGES.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—WAGES . 1 B. L. R., S. N., 15
[I. L. R., 5 Bom., 132

See CASES UNDER MASTER AND SERVANT.

——— of labourers.

See BENGAL ACT VI OF 1865. [3 B. L. R., A. Cr., 39

——— Suit for—

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—WAGES. [6 B. L. R., Ap., 91

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WAGING WAR.

See SENTENCE—TRANSPORTATION. [3 W. R., Cr., 16

WAGING WAR—*continued.*

See JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—ABETMENT OF WAGING WAR . . 9 B. L. R., Ap., 36

WAGING WAR AGAINST THE QUEEN.

——— Conspiracy to wage war.—*Treason.—Misprision of treason.—Limitation of period for prosecution.—Penal Code, s. 121.—7 Will. III., c. 3, s. 5.*—The offence of engaging in a conspiracy to wage war, and that of abetting the waging of war, against the Queen, under section 121 of the Penal Code, are offences under the Penal Code only, and are not treason or misprision of treason; and therefore the provisions of the Statute 7 William III., Cap. 3, section 5, as to placing a limitation on the period for prosecution, are not applicable. QUEEN *v.* AMIRUDDIN . 7 B. L. R., 63 : 15 W. R., Cr., 25

WAIVER.

See CASES UNDER ACQUIESCENCE.

See BOND . . I. L. R., 1 Bom., 45

See LIMITATION ACT, 1877, ART. 75.
[I. L. R., 7 Mad., 577, 583
6 N. W., 88
11 Bom., 155
I. L. R., 3 All., 514
I. L. R., 5 All., 289
I. L. R., 2 All., 857
I. L. R., 5 Calc., 97
I. L. R., 9 Calc., 857

See LIMITATION ACT, 1877, ART. 179—ORDER FOR PAYMENT AT SPECIFIED DATE.
[I. L. R., 5 All., 289
I. L. R., 7 Calc., 56
13 C. L. R., 243
I. L. R., 13 Calc., 73

——— by prisoner.

See CRIMINAL PROCEEDINGS.
[I. L. R., 2 Calc., 23
I. L. R., 6 Calc., 83

——— of irregularity.

See LIMITATION ACT, 1877, ART. 179 (1871, ART. 167)—JOINT DECREES—JOINT DECREE-HOLDERS . I. L. R., 4 Calc., 605

——— of objection.

See CASES UNDER APPELLATE COURT—OBJECTION TAKEN FOR FIRST TIME ON APPEAL.

See CASES UNDER JURISDICTION—QUESTION OF JURISDICTION—CONSENT OF PARTIES AND WAIVER OF JURISDICTION.

1. **——— Waiver by conduct.**—*Appeal.—Irregularity.—Substitution of parties.—Consent.*—Where the purchaser of a plaintiff's rights was substituted for the plaintiff, the irregularity was held to be cured by the consent of the defendant, implied in his offering no opposition, but appealing

WAIVER.—Waiver by conduct—*continued.*

from the judgment on the merits, making the substituted plaintiff one of the respondents. BEER CHUNDER ROY *v.* TUMEEZOODDEEN . **12 W. R., 87**

2. ——— *Appeal.—Right of objection to proceedings taken in accordance with appeal to High Court.*—Where a party, dissatisfied with the decision of the lower Court, appeals to the High Court and reopens the whole case, he must acquiesce in the result finally arrived at by the Court below in accordance with the instructions of the High Court in his appeal. GUNGARAM DUTT *v.* CHOWDHRY JUMNAJOY MULLICK . **1 C. L. R., 144**

3. ——— *Withdrawal of objection.—Raising same objection subsequently.*—Where parties have, before the Deputy Collector, withdrawn their objections to an Ameen's report, the lower Appellate Court should not allow the same objections to be revived before it. BHUGOBUTTY BURMONEE *v.* GOUR CHUNDER MUNDUL **[9 W. R., 267**

KANTEE CHUNDER DUTT *v.* GOPEE MADHUB NEOGEE . . . . **11 W. R., 3**

4. ——— *Objection to non-service of notice of execution.—Appearance.*—Where a judgment-debtor appears and contests the decree-holder's right to execute his decree, he cannot object that no notice was served as required by law, having impliedly waived the objection. GRISH CHUNDER BANERJEE *v.* BHANOO MOTEE CHOWDHRAIN **[11 W. R., 329**

5. ——— *Waiver by judgment-debtor of objection.—Right to deduct mesne profits.*—A judgment-debtor claiming a deduction on account of mesne profits decreed against him should make good his claim when called upon by the Court executing the decree. Failing to do so he loses his remedy. NUBO COOMAR CHATTERJEE *v.* RAMDHUN CHATTERJEE . . **15 W. R., 266**

6. ——— *Omission to take objection.—Remand.—Held* that the defendant, not having taken an objection to the suit on the ground of the minority of the plaintiffs, whilst it was pending in appeal to the High Court, were precluded from raising it on remand. BENI RAM BHUTT *v.* RAM LAL DHUKRI. . **I. L. R., 13 Calc., 189**

7. ——— **Effect of waiver.**—*Landlord and tenant.—Waiver of right of forfeiture for non-payment of rent.*—A landlord who has waived his right to sue for the cancelment of a lease on the ryot's failure to pay six successive instalments, is not barred by limitation from suing for cancelment on further breaches of the covenant. DULLI CHAND *v.* MEHER CHAND SAHOO . . **8 W. R., 138**

8. ——— *Waiver of vendor binding on purchaser.—Sale for arrears of rent.*—The Government, as auction-purchaser of the zemindari right of a pergunnah, having waived all right to cancel the tenures of the talookdars, and having admitted them to settlement and otherwise recognised

WAIVER.—Effect of waiver—*continued.*

their rights, it was held that the defendant, a purchaser, could not put in force against the talookdars any rights which his vendor had waived. OBHOY CHURN ROY *v.* ASANOOLLAH **[2 W. R., Act X, 81**

9. ——— **Waiver of rights under mortgage.**—*Resumption by Government of mortgaged land under Land Acquisition Act, and re-sale to mortgagor.—Omission of mortgagee to claim compensation.*—Government having under the Land Acquisition Act taken possession of portion of certain land which had been mortgaged by the owner subsequently, while the mortgage was still in force, re-sold the portion taken, to the mortgagor, who sold it to a third person *bonâ fide* for value. In a suit by the mortgagee (who had taken no steps to obtain any portion of the money paid by the Government for the land) praying for the sale under the mortgage of the land resumed by Government,—*Held* that the plaintiff as mortgagee had waived his rights under the mortgage, and that the purchaser from the mortgagor had acquired a title free from the plaintiff's incumbrance. *Quære,*—Whether the mortgage claim might not, but for the waiver, have re-attached, on the lands resumed by the Government again coming into the possession of the mortgagor. RAM AWTAR SINGH *v.* TULSI RAM . . **5 C. L. R., 227**

10. ——— **Waiver of grounds of enhancement.**—*Reliance on one ground only.—Presumption.*—In a suit for enhancement of rent upon different grounds, the fact that at the hearing the plaintiff relies on one of the grounds only, and that in the judgment of the first Court the whole case was rested on that ground only, is not a safe warrant for the inference that the other grounds were waived. BONOMALEE CHURN MYTEE *v.* SHOROOP HOOTAIT **[14 W. R., 60**

11. ——— **Waiver of right to execute decree.**—*Agreement to give time to debtor.—New contract.*—The granting of a judgment-debtor the indulgence of a temporary stay of the warrant of execution issued to enforce the decree, does not prejudice the judgment-creditor's right to execution at a subsequent time. BUTCHENNEE *v.* RAYUDU **[5 Mad., 285**

12. ——— *Waiver where decree-holder was allowed to perform act under decree in case judgment-debtor failed to do so.—H. C.* obtained a decree against *G. R.* for the reconstruction in the family house, within one month, of a verandah which had been improperly pulled down by the latter; on failure of *G. R.* to rebuild it in the specified time, the decree-holder was to be allowed to rebuild it himself at the cost of *G. R.* About a month after the reconstruction was begun, but after the lapse of the month allowed to the judgment-debtor *H. C.* applied for an injunction to stop the work as not being according to the decree, and for permission to rebuild it himself. *Held,* notwithstanding *G. R.* had made alterations and contravened the decretal order, the judgment-creditors' conduct in looking on without remonstrance for nearly a month while the

WAIVER.—Waiver of right to execute decree—*continued.*

judgment-debtor incurred considerable expense amounted to a waiver of his right to take matters into his own hands. GOPEE KISHEN GOSSAIN *v.* HEM CHUNDER GOSSAIN . . **16 W. R., 38**

13. ——— Waiver of right to interest on arrears of rent.—*Receipt of arrears of rent for long time without interest.*—By the terms of a kabuliat, rent not paid when due was to bear interest. The zemindar received rent for a period of ten years without making any demand of interest in respect of arrears, and without claiming to apply any portion of the payments towards the discharge of interest. Having subsequently brought a suit for interest, the Courts below were of opinion that the zemindar had waived his claim to interest and dismissed his suit. *Held* that there were facts justifying such an inference, and that their finding could not be reviewed in special appeal. DINDOYAL PORAMANICK *v.* PRAN KISHEN PAUL CHOWDHRY

[Marsh., 394 : W. R., F., B., 117 : 2 Hay, 423

14. ——— *Omission to enforce interest under kabuliat.—Variation in contract.*—In order to establish variation in a written contract, it must be distinctly pleaded and proved when and how the variation took place, the mere fact of a kabuliat not having been enforced in the most stringent manner does not take away from the lessor the right to enforce it. PEAREE MOHUN MOOKERJEE *v.* BROJO MOHUN BOSE . . . . **21 W. R., 36**

PEAREE MOHUN MOOKERJEE *v.* BROJO MOHUN BOSE. . . . . **22 W. R., 423**

15. ——— *Omission to claim interest.—Pleading.*—Both parties stipulated for payment of rent on certain dates, and, if not so paid, of a certain rate of interest until paid. The rent not having been paid at the time agreed on,—*Held* that the landlord's omission to claim interest, instalment by instalment, for the fractional time that the rent was not paid after it became due, did not justify the plea that the interest stipulated for was not due, or warrant the belief that the plaintiff had waived his claim to interest. RUTTY KANT BOSE v. GUNGADHUR BISWAS

[W. R., F. B., 13 : 1 Ind. Jur., O. S., 6 : Marsh., 40

16. ——— Waiver of objection to service of notice of enhancement.—*Omission to appeal from decision finding notice properly served.—Question of law and fact.*—Plaintiff sued to recover rents at enhanced rates after notice, and got a decree. Defendants appealed on the merits, tacitly accepting the finding of the lower Court that notice had been duly served. On appeal, the Subordinate Judge of his own motion took up the question of notice, decided that it had not been duly served, and reversed the decree of the lower Court. *Held* that the Subordinate Judge was wrong, for seeing that the defendants had not appealed from the finding of the first Court which declared that there had been good service, it might fairly be presumed that they had due notice of the claim to enhance, until evidence sufficient to rebut that presumption should be shown. An objection that notice of enhancement has not been properly served is not an objection purely of law, but a mixed objection of law and fact, which may be impliedly waived by the conduct of the parties. *Chunder Monee Dossee* v. *Dhuroneedhur Lahory*, 7 *W. R.*, 2, cited and distinguished. SHUSHEE BHOOSUN *v.* MUDDUN MOHUN CHUTTOPADHIYA . . **2 C. L. R., 297**

WAIVER.—Waiver of objection to service of notice of enhancement—*continued.*

17. ——— Agreement come to under mistaken belief.—*Agreement to accept provision in satisfaction of claim to maintenance.—Mutual mistake, Effect of.—Suit by son for partition.—Relinquishment of claim.*—The plaintiff's father, a member of an undivided Hindu family, signed an agreement by which he agreed to accept a provision in satisfaction of his claim for maintenance. The agreement was signed by reason of a mistaken belief entertained by the plaintiff's father and the other members of the family that there existed an established custom in the family which rendered the property indivisible. *Held*, in a suit by the plaintiff for a partition of the family property liable to partition, that the agreement having been come to under a mutual mistake, it was no bar to the plaintiff maintaining the suit, for it would not have prejudiced the right of the plaintiff's father if he had chosen to insist upon a partition. SOOBBAMANIA TELAVER *v.* SOKKA TELAVER

[5 Mad., 437

18. ——— *Agreement to accept portion of property for maintenance.—Suit for full share of property on partition.*—In a suit to recover a share of family property, the Civil Judge found that the plaintiff in 1856 waived his right to a share of the family property by accepting a small portion, and dismissed the suit. The plaintiff shared with other members of the family the belief that by established family usage the property was impartible and passed at each succession to the eldest of the co-heirs according to the ordinary law, the other co-heirs being entitled only to a portion for maintenance. Under that belief the plaintiff accepted the allotment made to him in 1856 by the then eldest co-heir of a smaller portion of the property than he would be entitled to on a partition, as a sufficient provision for his maintenance. The plaintiff's younger brother instituted a suit in 1861, and succeeded in resisting the alleged custom, and obtained a decree for his full share. *Held* (reversing the decision of the Civil Judge) that the plaintiff was entitled to the relief asked for, it not appearing from the arrangement of 1856 that the parties intended the allotment to be in satisfaction and discharge of every right of the plaintiff as a coparcener. SUBBIEM PILLAY *v.* ARNACHALA IRUNGOL PILLAY . . . **5 Mad., 444**

19. ——— Waiver by renunciation of rights.—*Renunciation of rights.—Law of waiver.—Privileges of office.*—It is not law that every right may be renounced. The general rule is power of renunciation, but there are two marked classes of exceptions: There can be no renunciation of rights and consequent destruction of relative duties prescribed by an absolute law; nor of things inherent in man as

WAIVER.—Waiver by renunciation of rights—*continued.*

man. A man may renounce a concrete right, but not one resulting from a natural condition. *Semble*,—A karnavan cannot part, by contract, so as to be unable to resume them, with the privileges and duties which attach to his position as a karnavan. CHERUKOMEN *alias* GOVINDEN NAIR *v.* ISMALA . **6 Mad., 145**

APPUNI *v.* AYANEPALLI EKANATHA THAVAI VARIKARNAVAN SHANGUNI. APPUNI *v.* VETTUTHADATHA SHAMA . . . **6 Mad., 401**

20. ——— Effect of signing document in which there is an omission.—*Omission in wajib-ul-urz of interest in property.—Imperfection in settlement proceedings.*—The mere signature by an agent of a wajib-ul-urz from which the record of an important interest in property was omitted, cannot be construed as a waiver of such right or claim. Still less can the imperfection or inaccuracy of settlement proceedings operate to extinguish or disallow existing rights. IMAMBUNDEE *v.* BHUGWAN DASS . . . . **1 N. W., 41: Ed. 1873, 38**

21. ——— Effect of acceptance of mortgage-money on right of purchase.—*Condition in favour of purchase by mortgagee.—A.* mortgaged land to *B.*, the mortgage instrument providing that *B.* should be entitled to purchase the land if it were not redeemed by 12th July 1843. In 1845 *B.* accepted from *A.* one pagoda in part payment of the mortgage-money. *Held* that this was a waiver by *B.* of his right to purchase. VENKATACHARI *v.* ANANTACHARI **[1 Mad., 69**

22. ——— Refusal to receive rent in kind.—*Effect of refusal on right to sue for rent.*—A refusal by a landlord to accept rent in kind when it is tendered, on the ground that he is suing for a money rent, is a waiver of his right to sue his tenant (on the dismissal of his suit for a money rent) for the value of the rent in kind. NARAIN GEER *v.* GOUR SUBUN DOSS . . . . . **23 W. R., 368**

23. ——— Withdrawal of objection to sale in execution of decree.—*Effect of, on subsequent right to sue to set it aside.*—The plaintiff purchased certain property from the first and second defendants. The property was subsequently put up for sale by order of the Civil Court in execution of a decree against the first and second defendants, and was purchased by the third defendant. When the property was about to be sold under the decree, the plaintiff presented to the Court a petition objecting to the sale, but his vakil withdrew the petition with his consent before the sale. In a suit by the plaintiff for the recovery of the land,—*Held* that the plaintiff was not precluded from recovering the land by reason of his having withdrawn the petition, as he could not thereby be considered to have waived his right to sue. KUMARASAMY REDDI *v.* PANNA SOONA MOOROOGAPPA CHETTY . . . . . **7 Mad., 359**

24. ——— Relinquishment by Hindu widow.—*Relinquishment of title to property by widow.—Petition.*—A mere petition by a widow to the effect that she has relinquished her title in certain

WAIVER.—Relinquishment by Hindu widow—*continued.*

property in favour of parties suing the lessees of the property for possession, is not a legal relinquishment of her share therein. OOMA CHURN KOONDOO *v.* BHOOBUN MOHUN PAL . . **10 W. R., 98**

WAKF.

See ACT XX OF 1863, S. 18.
[15 B. L. R., 167
I. L. R., 3 Calc., 324

See CASES UNDER MAHOMEDAN LAW—ENDOWMENT.

WARRANT.

1. ——— Warrants made by Lieutenant-Governor of Bengal.—*Seal of Court.*—The Court will order its seal to be impressed on any warrant made by the authority of the Lieutenant-Governor of Bengal, even if not actually signed by him. ANONYMOUS . **1 Ind. Jur., N. S., 106**

2. ——— Search warrant.—*Criminal Procedure Code, 1861, ss. 114, 115.—Requisites of warrant.*—It is essential to the legality of a search warrant, under section 114 of the Code of Criminal Procedure, that the production of some specified and particular thing is desired; that the Magistrate alone shall determine that such production is necessary; and that a specified house or place only is to be searched. The warrant must, under section 115 of that Code, be directed to some other person only when a police officer is not forthcoming. QUEEN *v.* HOSSAIN ALI CHOWDHRY . . **8 W. R., Cr., 74**

WARRANT OF ARREST.

Col.
1. CIVIL CASES 6178
2. CRIMINAL CASES 6181

——— of Governor General in Council.

See BENGAL REGULATION III OF 1818.
[6 B. L. R., 392, 459
9 B. L. R., 36

See HABEAS CORPUS.
[6 B. L. R., 392, 459

1. CIVIL CASES.

1. ——— Absence of warrant.—*Discharge from custody of Sheriff.*—The Court will discharge a prisoner from custody when the jailor holds no warrant for his detention, although he has been properly in the custody of the Sheriff. IN THE MATTER OF SHAH SAHIB . **1 Ind. Jur., N. S., 19**

2. ——— Informality of warrant.—*Application for discharge.—Civil Procedure Code, 1859, s. 273.—Delay in bringing up prisoner.—B. M.* and several other prisoners in the custody of the Sheriff of Calcutta for debt, without having been brought up to have an order for their allowance made, on being produced for that purpose by the Sheriff, applied for their discharge under section 273

WARRANT OF ARREST—*continued.*

1. CIVIL CASES—*continued.*

Informality of warrant—*continued.*

of Act VIII of 1859. Preliminary objections were taken to the validity of the warrants on which the Sheriff arrested them, on the grounds that the time for execution was not specified in them; and that even had they been originally valid their authority had expired, owing to the delay in bringing up the prisoners. Both objections were overruled. *Held* that a mere informality in a warrant, such as the omission of the time for execution, only renders it irregular, and does not invalidate it: that advantage having been taken of such irregularity to prejudice the prisoner, affords grounds for an application to the Court to set the warrant aside: and that a mere delay in bringing the prisoner before the Court after his arrest, if not for a considerable period, does not render his detention illegal. IN RE BHOLANAUTH MULLICK [Bourke, O. C., 96

3. ———— **Form of warrant.**—*Sufficiency of warrant.*—Where a person had been taken in execution under a *ca. sa.* directed to the Sheriff under the old procedure, it was held to be sufficient to empower the jailor to detain him. The words "ordinary civil jurisdiction" are only used to distinguish the civil from the criminal jurisdiction. IN RE ANWAR BISWAS . . . 1 Ind. Jur., N. S., 106

4. ———— **Writ of Calcutta Small Cause Court, Form of.**—*Act XII of 1865.—Fixing subsistence-money.*—A writ of the Calcutta Small Cause Court commanding its "Bailiff to take the body of *A.*, and have him before the Court on the——day of ——to satisfy *B.* in the sum of——debt and costs, ordered and decreed by the said Court on the——day of——to be paid to the said *B.* with costs of execution, and by virtue thereof to take and convey the said *A.* to the common jail of the said Court, there to be detained in safe custody for——weeks, or until he shall sooner perform the said order of the Court," is in point of form a sufficient warrant to the jailor to receive and detain *A.*, notwithstanding Act XII of 1865. It was not necessary, in the case of commitment of a debtor to prison by the Calcutta Court of Small Causes, to bring him in the first instance before the Court, as under the provision of Act VIII of 1859, in order to have his subsistence-money fixed. IN THE MATTER OF MEER NAWAUB [1 Ind. Jur., N. S., 315

5. ———— **Warrant directed to Nazir.**—*Arrest of judgment-debtor.—Indorsement to peon.—Civil Procedure Code, 1882, s. 343.—Indorsement of particulars of arrest by Naib Nazir.*—Where a warrant issued by a subordinate Court, directing the Nazir to arrest a judgment-debtor in execution of a decree, was entrusted by the Nazir to a subordinate for execution by indorsing his name upon it,—*Held* that there is nothing in the Civil Procedure Code to prohibit a Nazir from authorising a deputy to execute a warrant of arrest for him, and that his indorsement must be regarded as *primâ facie* evidence of the authority of the person to whom the warrant is delivered to execute it. *Held*, also, that it is most desirable, when the Nazirs of the subordinate Courts delegate the duty of executing warrants of arrest, that they should confer the authority in more clear and explicit terms than are expressed by a mere indorsement, and that they should be careful in selecting proper persons to discharge that duty, bearing in mind, as far as circumstances permit, the position and caste of the party to be arrested, so as to avoid, through the medium of Court process, subjecting any such party to personal indignity or offence. *Held*, further, that it is important that the person chosen should be made acquainted with the contents of the warrant in order that he may be able to inform the judgment-debtor at whose suit and for what amount he is being taken into custody. Where a warrant for the arrest of the judgment-debtor had been executed, and an indorsement thereon, professedly under section 343 of the Civil Procedure Code, was irregularly made by the Naib Nazir, he not having been "the officer entrusted with the execution of the warrant,"—*Held* that such irregularity did not invalidate the arrest. ABDUL KARIM *v.* BULLEN . I. L. R., 6 All., 385

6. ———— **Irregularity in warrant.**—*Warrant of arrest in execution of a decree only initialled by proper officer.—Civil Procedure Code, 1882, ss. 2, 251.*—A warrant issued for the arrest of a debtor under the provisions of section 251 of the Civil Procedure Code, was initialled by the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution. The debtor forcibly resisted the officer, and was tried and convicted, under section 353 of the Penal Code, of assaulting a public servant in the execution of his duty as such. In revision, it was contended, with reference to the requirements of section 251 of the Civil Procedure Code, that the warrant of arrest, having been initialled only, was bad, and the officer could not legally execute it, and consequently no offence under section 353 of the Penal Code had been committed. *Held* that this contention could not be allowed, and although it was proper that the person signing a warrant should write his name in full, it could not be said that because the signature was confined to the initials of the name, it was not the duty of the officer to execute the warrant. QUEEN-EMPRESS *v.* JANKI PRASAD . I. L. R., 8 All., 293

7. ———— **Validity of warrant.**—*Liability of Nazir.—Escape of judgment-debtor.*—The plaintiff sued out a warrant for the arrest of his judgment-debtor on the 4th December 1876. The warrant was lodged with the Nazir on the 16th December and was to be in force till the 4th January 1877. On the 22nd December 1876 the Nazir was informed that the judgment-debtor was already in the civil jail under a writ of execution issued by another creditor. The Nazir then returned the warrant to the Subordinate Judge who had issued it. On the 29th December the Subordinate Judge again sent it to the Nazir's office, where it was duly received by the Nazir's karkun (defendant No. 2). This fact was not reported by the karkun to the Nazir (defend-

WARRANT OF ARREST—*continued.*

1. CIVIL CASES—*continued.*

Validity of warrant—*continued.*

ant No. 1) until the 4th January 1877. On the 1st January 1877 the judgment-debtor's debt was paid by Government, and he was released in honour of Her Majesty's assumption of the title of Empress of India. The judgment-debtor thereupon left the district and could not be found, and the plaintiff's warrant remained unexecuted. The plaintiff sued the Nazir and his karkun for allowing for his judgment-debtor to escape. *Held* that the Nazir ought not to have sent the warrant back to the Subordinate Judge, and that there was no necessity for a fresh order on it until the time for which it had to run had expired. *Held* also that, according to Act VIII of 1859, as it stood at the end of 1876 and until October 1877, the batta for the maintenance of a debtor could not become payable until he was arrested and brought before the Court, and the latter made the order for his committal to the civil jail. KASTURCHAND *v.* RAVJI SADASHIV . . **I. L. R., 4 Bom., 65**

2. CRIMINAL CASES.

8. ——— Arrest in pending case.—*Power of Magistrate.—Criminal Procedure Code, 1861, s. 68.*—Section 68 of the Code of Criminal Procedure gave a Magistrate jurisdiction on proper evidence to issue a warrant for the arrest of persons in a pending case. IN THE MATTER OF SIDESHURY CHOWDHRAIN . . . **16 W. R., Cr., 50**

9. ——— Warrant on non-appearance to summons.—*Lessee of tolls.—Disobedience of summons to appear.—Undertaking not to sue.*—*A.*, the lessee of a toll, was in arrear to Government in respect of the rent. The Magistrate issued a summons to him, whereby it was recited that a plaint had been preferred against him (*A.*) for not paying the sum of R262 for arrears of rent, and *A.* was summoned to appear before the Magistrate to answer the charge. *A.* did not appear on the day appointed, but had an application presented for postponement of the demand for arrears of rent, on the grounds therein stated. On the following day the Magistrate passed the following order: "Whereas the debtor, defendant, has not appeared in person, the summons has not been obeyed; therefore it is ordered that a warrant be issued for the arrest of the defendant." Proceedings were afterwards taken upon the warrant. *Held* that all the proceedings taken by the Magistrate were irregular and must be set aside, the defendant undertaking not to take legal proceedings for anything done under the order or warrant. IN THE MATTER OF BANKA BIHARI GHOSE **[2 B. L. R., A. Cr., 17: 11 W. R., Cr., 26**

10. ——— Issue of warrant.—*Complaint on oath.—Report of police officer.—Criminal Procedure Code, 1869, ss. 68 and 155.*—In cases in which the police cannot arrest without a warrant, a warrant cannot legally be issued by a Magistrate except on a complaint made on oath (or under section 68 of the Criminal Procedure Code), whether such Magistrate is authorised to entertain cases either on complaint

WARRANT OF ARREST—*continued.*

2. CRIMINAL CASES—*continued.*

Issue of warrant—*continued.*

directly to himself or on the report of a police officer. REG. *v.* JAFAR ALI . . **8 Bom., Cr., 113**

11. ——— *Arrest on report of policeman for offence for which arrest without warrant might be made.*—Where a policeman in whose sight a theft was committed arrested the thief, and being himself unable to take or send the accused to a Magistrate, sent a report, on which the Magistrate issued a warrant,—*Held* that, under these circumstances, the accused was legally brought before the Magistrate. REG. *v.* MAHIPYA VALAD BOMYA MAHAR . . . **5 Bom., Cr., 99**

12. ——— *Validity of warrant.—Criminal Procedure Code (X of 1872), s. 157.—Magistrate out of jurisdiction.—Extradition.*—It was not essential to the validity of a warrant issued under section 157 of Act X of 1872 that the Magistrate issuing it should be, at the time he issues it, within the local limits of his jurisdiction. He might issue such a warrant from a place in foreign territory. REG. *v.* LOCHA KALA. **[I. L. R., 1 Bom., 340**

13. ——— Procedure on warrant.—*Act XII of 1867.*—When a prisoner was arrested by the Sheriff under a writ of *ca. sa.*, it was necessary to bring him before the Court without delay, under section 14 of Act XII of 1867. IN RE RAMCOOMAR DUTT. . . . . **2 Ind. Jur., N. S., 340**

14. ——— Operation of warrant.—*Detention of prisoner.*—The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate. MUTHOORA NATH CHUCKERBUTTY *v.* HEERA LALL DOSS . **17 W. R., Cr., 55**

A Magistrate, therefore, is not at liberty to retain an accused person in custody, except upon a proper remand made after taking sufficient evidence given on oath or solemn affirmation. IN THE MATTER OF ZUHURUDDEEN HOSSEIN . . **25 W. R., Cr., 8**

15. ——— *Warrant issued to unofficial person.—Criminal Procedure Code (Act X of 1872), s. 161.—Act XXV of 1861, s. 77.*—Under section 77 of the Criminal Procedure Code, a Magistrate ought not to issue a warrant to an unofficial person, except when he is without the assistance of competent police officers, and unless the urgency is imminent. The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate, and the prisoner cannot lawfully be committed to prison or remanded without sufficient grounds; and in the absence of evidence there can be no grounds. IN THE MATTER OF THE PETITION OF SURENDRONATH ROY. QUEEN *v.* SURENDRONATH ROY **[5 B. L. R., 274: 13 W. R., Cr., 27**

16. ——— *Criminal Procedure Code (Act XXV of 1861), s. 68.—Act X of 1872, ss. 142 and 150.—Detention of accused.*—A warrant issued under section 68, which was a warrant

WARRANT OF ARREST—*continued.*

2. CRIMINAL CASES—*continued.*

Operation of warrant—*continued.*

of arrest as described under section 76 (Form B), is only for the purpose of bringing an accused person before the Magistrate. It was not a warrant for commitment, and did not authorise the detention of a person longer than is necessary for his production before the Magistrate. To detain him further there must be a fresh warrant under section 222, charging the prisoner with some offence, on evidence taken on oath or affirmation, and in the presence of the accused. IN THE MATTER OF MAHES CHANDRA BANERJEE. QUEEN *v.* PURNA CHANDRA BANERJEE. QUEEN *v.* KALI SIRKAR

[4 B. L. R., Ap., 1: 13 W. R., Cr., 1

17. ———— *Detention of accused.—Order sanctioning detention for indefinite period.—Remand of accused.—Held* that the order of a Magistrate sanctioning the detention by the police of an accused person for an indefinite period is illegal. At the expiration of twenty-four hours from the time of arrest, the accused must be brought before a Magistrate, who could then remand for a period not exceeding fifteen days, under section 224 of the Criminal Procedure Code, 1861. No remand without a hearing can last for a longer period. REG. *v.* SURKYA VALAD DHAKU . . **5 Bom., Cr., 31**

18. ———— **Form of warrant.**—*Omission to seal warrant.—Criminal Procedure Code, 1869, s. 76.—Requisites of good warrant.*—A warrant issued under section 76 of the Code of Criminal Procedure should be sealed, should describe the person to be apprehended under it with reasonable particularity, so that there may be no difficulty in establishing his identity, and should be subscribed with the name and full official title of the Magistrate issuing it. Where a warrant was defective in all the above particulars, the prisoner apprehended under it was released by the High Court. IN RE HASTINGS . **9 Bom., 154**

19. ———— *Act XIII of 1856, s. 58.—Error in warrant not affecting conviction.*—A warrant issued under section 58 of Act XIII of 1856 should be addressed to some one or more inspectors, and not generally to "all constables and peace officers." Where a warrant in the latter form was executed under the direction of an inspector, it was held that the error in the form of the warrant was merely an error of procedure, and did not affect the validity of the conviction, under section 57, of persons apprehended in pursuance of the warrant so executed. REG. *v.* NANA MOROJI. IN RE MADHAV MORAB . . . **8 Bom., Cr., 1**

20. ———— *Warrant not containing specification of offence.*—A warrant which did not specify a punishable offence, and which had been issued upon a statement not sufficient to make out any offence, quashed. IN RE BIDHUMUKHI DEBI . . . . **6 B. L. R., Ap., 129**

S. C. BIDHOOMOOKHEE DABEE *v.* SREENATH HALDAR . . . **15 W. R., Cr., 4**

WARRANT OF ARREST—*continued.*

2. CRIMINAL CASES—*continued.*

21. ———— **Informality in warrant.**—*Criminal Procedure Code, 1869, s. 404.—Power of High Court.—Irregularity in process of arrest and attachment.*—The High Court was not empowered to interfere under the provisions of section 404 of the Criminal Procedure Code, 1869, until there has been a judicial proceeding by a Magistrate. A person complaining of irregularity of process issued for his arrest and for the attachment of his property, before applying to the High Court under section 404 of the Criminal Procedure Code, should make application to the Magistrate issuing such process for his discharge and the release of his property, on the ground of the informality of the warrants. QUEEN *v.* BISHESHUR PERSHAD

[2 N. W., 441: Agra, F. B., Ed. 1874, 236

22. ———— **Mode of arrest in foreign territory or out of jurisdiction.**—*Warrant of arrest for contempt of Court.*—The High Court of Bombay will not send a special bailiff into the territories of the Gaikvar of Baroda to arrest a defendant who has been guilty of a contempt of Court, but the Court will send a special bailiff for such purpose beyond the local limits of the High Court to a place within the Presidency of Bombay. HARIVALLABHDAS KULLIANDAS *v.* UTAMCHAND MANIKCHAND

[7 Bom., O. C., 172

WARRANT OF ATTORNEY.

1. ———— **Extent and operation of warrant.**—*Civil Procedure Code, 1859, ss. 17 and 49.—Acceptance of service and appearance.—Act XX of 1862, s. 7.*—A warrant of attorney to the attorney of a defendant to receive a declaration or plaint, &c., in any action or suit to be brought for the recovery of certain moneys, and to confess the same action or suit, or else to suffer or consent to a judgment or decree in the said action or suit by default, or in any other way to pass or be pronounced against the defendant, empowered the attorney to accept service and appear for the defendant within the meaning of sections 17 and 49 of Act VIII of 1859. *Held* that section 7 of Act XX of 1862 referred only to warrants of attorney for the entering up of judgments in the High Court which were in existence before the 1st July 1862. KHALUT CHUNDER GHOSE *v.* SARODASOONDERY DOSSEE . **Bourke, O. C., 244**

2. ———— **Limitation Act, 1859.**—*Entering up judgment.*—The statute of limitation is no answer to a rule *nisi* to enter up judgment on a warrant of attorney. SOOJAN MULL *v.* HYDER JUNG BAHADOOR . . . **1 Ind. Jur., O. S., 58**

WARRANT OF COMMITMENT.

———— **Signature of Magistrate.**—*Criminal Procedure Code, 1872, s. 303.*—The signature of a Magistrate to a warrant of commitment under section 303 of the Code of Criminal Procedure, 1872, should not be affixed by a stamp. SUBRAMANAYA *v.* QUEEN . . . . **I. L. R., 6 Mad., 396**

WARRANT OF EXECUTION.

1. ——— Extension of time for operation of warrant.—*Act X of 1859, s. 88.—Jurisdiction.*—Where a warrant of execution under Act X of 1859, section 88, was extended for four days after a particular day, when the original warrant was not sixty days old, in order that more moveable property might be pointed out,—*Held* that, until the time so extended had elapsed, an order for sale of immoveable property was without jurisdiction. NABI BAX *v.* DIDAR BAX SHAH [3 B. L. R., A. C., 10: 11 W. R., 326

2. ——— Return of warrant.—*Public servant.—Resistance to public servant.—Penal Code, s. 183.—Civil Procedure Code, 1882, s. 251.*—A person was convicted under section 183 of the Penal Code for offering resistance to the attachment of property by a public servant. The offence was committed on the 4th of February 1883, but the warrant under which the public servant acted was returnable on or before the previous day. *Held* that the conviction was bad. IN THE MATTER OF THE PETITION OF ANAND LALL BERA. ANAND LALL BERA *v.* EMPRESS ON THE PROSECUTION OF AZIM PEON . I. L. R., 10 Calc., 18: 13 C. L. R., 209

3. ——— Irregularity in warrant.—*Civil Procedure Code, 1859, s. 222.—Civil Procedure Code, 1877, 1882, s. 251.*—An execution sale of the right, title, and interest in land was set aside by the Court, on the ground that the warrant for the execution of the decree and order of attachment of the property sold had not been signed by the Judge, but by the Munsarim of the Court; and at a second sale the property was sold to other purchasers, who, as well as the judgment-debtor, were sued by the purchaser at the first sale for a declaration of his right to have the first sale confirmed. The High Court having held that, with reference to section 222 of Act VIII of 1859, the first sale had been rightly set aside, an appeal to the Judicial Committee was dismissed with costs. RAM DAYAL *v.* MAHTAB SINGH . . . . I. L. R., 7 All., 506

WARRANTY, BREACH OF—

See CHARTER-PARTY.
[8 B. L. R., 544: 23 W. R., 136

See CONTRACT—BREACH OF CONTRACT.
[8 B. L. R., 544: 23 W. R., 136

See CONTRACT ACT, S. 78.
[I. L. R., 4 Calc., 801

See CASES UNDER VENDOR AND PURCHASER—BREACH OF WARRANTY.

WARRANTY OF TITLE.

See CASES UNDER SALE IN EXECUTION OF DECREE—PURCHASERS, TITLE OF—GENERALLY.

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—RIGHTS OF PURCHASERS . I. L. R., 2 Bom., 258

See CASES UNDER VENDOR AND PURCHASER—BREACH OF WARRANTY.

WARRANTY OF TITLE—*continued.*

See CASES UNDER VENDOR AND PURCHASER—CAVEAT EMPTOR.

WASHERMAN.

See MADRAS TOWNS IMPROVEMENT ACT, 1871, S. 1 . I. L. R., 1 Mad., 174

WASTE.

See HINDU LAW—ALIENATION—ALIENATION BY WIDOW—SETTING ASIDE ALIENATIONS, AND WASTE.
[1 B. L. R., A. C., 27
5 B. L. R., 508
6 B. L. R., 747
B. L. R., Sup. Vol., 48
8 W. R., 273
1 W. R., 256
2 N. W., 78
24 W. R., 86
3 B. L. R., 362
10 B. L. R., P. C., 1
9 W. R., 362

See HINDU LAW—REVERSIONERS—WHO MAY SUE . I. L. R., 6 Calc., 198
[6 Moore's I. A., 433
I. L. R., 9 Calc., 817
Marsh., 622

See LIMITATION ACT, 1877, ART. 125 (1859, S. 1, CL. 16) . 7 B. L. R., 131

1. ——— Limitation.—*Allegation of waste.—Prayer for protection from contemplated waste.—Held per* PHEAR, *J.*, that where a suit was one to prevent contemplated waste, it was not barred by lapse of time. GROSE *v.* AMIRTAMAYI DASI
[4 B. L. R., O. C., 1: 12 W. R., O. C., 13

BISWANATH CHUNDER *v.* KHANTAMANI DASI
[7 B. L. R., 131

2. ——— Liability for waste.—*Hindu widow; liability for waste committed by her husband as administrator.*—In a suit against a widow individually, and not in her representative capacity, to recover plaintiff's share of property alleged to have been in her possession, the suit being one wherein defendant was charged with devastation in respect of such property only,—*Held* that defendant was not liable in that suit to be made answerable out of her husband's assets for any devastation which he might have committed. STAVES *v.* DIAS . 10 W. R., 444

WASTE LANDS.

See LANDLORD AND TENANT—MIRÁSIDARS.
[I. L. R., 1 Mad., 205

See SETTLEMENT—RIGHT TO SETTLEMENT.
[4 Mad., 429

See SETTLEMENT—SUBJECTS OF SETTLEMENT . . . 1 Mad., 12, 407

See VALUATION OF SUIT—SUITS.
[7 W. R., 349

1. ——— Presumption from land lying waste.—*Evidence as to possession.*—The fact of

WASTE LANDS.—Presumption from land lying waste—*continued.*

land lying waste does not of itself show that no one is in possession. MAHOMED ALI *v.* SHURUM ALI [8 W. R., 422

2. ——— **Ownership of waste land.**—*Presumption as to possession.*—Where land is waste and there is no visible sign of occupation, the possession must be taken to go with the right, and the right is *primâ facie* in the zemindar of the estate to which the waste land belongs. WOODWANT MAHTOON *v.* HUNOOMAN PERSHAD SINGH [22 W. R., 419

3. ——— **Possession of waste land.**—*Limitation.—Presumption.—Proof of title.*—There may be such possession of waste lands as to protect a suit from being barred by limitation; and where the question of possession is doubtful, a presumption will arise in favour of the party who proves title. MAHOMED BASSIR *v.* KUREEM BUKSH . 11 W. R., 268

4. ——— *Possession, Presumption of, from evidence of title.*—In disputes as to the right to possession of waste and jungle lands, it is only in cases where neither party has exercised any acts of ownership over the lands in question that the Court may resort to evidence of title, and presume that the party proved to have title has also possession. RAM BANDHU *v.* KUSU BHATTU [5 C. L. R., 481

5. ——— *Title to uncultivated or jungle lands.—Adverse possession.—Limitation.—Acts of ownership.*—If adverse possession for a sufficiently long time is proved, the title of a person to uncultivated or jungle land may be barred by limitation in the same manner and to the same extent as in the case of cultivated land; the evidence of possession being the exercise of such acts of ownership as would ordinarily be exercised over property of that nature. MITTERJEET SINGH *v.* RADHA PERSHAD SINGH . . . . . 23 W. R., 368

See WATSON *v.* GOVERNMENT [B. L. R., Sup. Vol., 182 : 3 W. R., 73

6. ——— **Right to use of waste land.**—*Permissive use of, by tenants.—Right of landlord to erect building on.—Works of permanent character executed by licensee.—Easements Act, V of 1882, ss. 60, 61.*—In a suit by a zemindar to have his right declared to build a house on some waste land in the mouzah, the defendants, who were tenants in the mouzah, resisted the claim, on the ground that they had built wells and water courses on the land, and had a right also to use it as a threshing-floor and for stacking cow-dung. *Held* that the defendants having acquired no right adverse to the plaintiff as owners, by prescription or otherwise, in the land, their right of use could only be as licensees of the plaintiff; and although he could not interfere with their right to the wells, which were works of a permanent character, and on which the defendants had incurred expenses, he could revoke the license as to the other use claimed of the land, and his claim to build the house should therefore be decreed. LAND MORTGAGE BANK OF INDIA *v.* MOTI [I. L. R., 8 All., 64

WASTE LANDS—*continued.*

7. ——— **Act XXIII of 1863, s. 5.**—*Suit to contest sale.*—Where the Collector failed to give notice of his intention to dispose of the estates, it was not incumbent on the plaintiff to contest the sale within the period prescribed by section 5, Act XXIII of 1863. HIMMUT SINGH *v.* COLLECTOR OF BIJNOUR . . . 2 Agra, 258

8. ——— *Act to reclaim waste lands.—Suit to contest award by Board of Revenue.—Extension of time.—Institution of suit.*—The Court cannot extend the period of thirty days allowed by section 5, Act XXIII of 1863, for preferring a suit to contest an award by the Board of Revenue. The filing of a vakalutnamah is not an institution of such a suit. TARANATH DUTT *v.* COLLECTOR OF SYLHET [5 W. R., Waste Land Court Ref., 1

9. ——— **ss. 8, 18.**—*Suit for possession.—Statute, Interpretation of.*—Where an Act expressly takes away one particular remedy which would otherwise have been open for enforcing a right of property, or in any other particular interferes with proprietary rights, but does not, in express words or by necessary implication, declare that those rights shall cease, the method of interpretation which ought to be adopted is to give effect to the Act exactly so far as its words extend, and no further. There is nothing in Act XXIII of 1863 to prevent a person who has a good title and has throughout been in possession, or who has a good title, and at any time succeeds in peaceably getting possession, and is not ousted in a possessory suit, or who for any other reason is in the advantageous position of a defendant, from defending his rights, notwithstanding any sale which the Government may have professed to make under the Waste Lands Act. *Quære,*—Whether the terms of the Act are not sufficiently satisfied by making it apply to waste lands of Government, and by understanding the claims and objections mentioned in the Act as claims in respect of Government land, and objections with the same limitation. KRISTO CHUNDER DASS *v.* STEEL [I. L. R., 12 Calc., 279

10. ——— **s. 18.**—*Suit for compensation for land wrongly sold as waste.*—A purchaser of land sold as waste land under Act XXIII of 1863 cannot be compelled to grant a pottah to a person alleging himself to have been in occupation of the land before the sale. If the claimant has omitted to come in in due time to stay the sale, and the land has actually been sold, his only remedy is by a suit under section 18 for compensation, making the Collector a defendant. MAGUN POLLAN *v.* MONEY [7 W. R., 474

WATER, ESCAPE OF, LIABILITY FOR DAMAGE DONE BY—

See EMBANKMENTS. [I. L. R., 3 Calc., 776

WATER-COURSE, RIGHT TO USE OF—

See CASES UNDER PRESCRIPTION—EASEMENTS—RIGHT TO WATER.

WATER-COURSE, RIGHT TO USE OF —*continued.*

See CASES UNDER RIGHT TO USE OF WATER.

WATER-SUPPLY, CAUSING DIMINUTION OF—

See MISCHIEF . I. L. R., 1 Mad., 262
[I. L. R., 10 Bom., 183

WEIGHTS AND MEASURES, FRAUDULENT USE OF—

Penal Code, s. 266.—Fraudulent intention.—The mere possession of weights in excess of the authorised standard will not support a conviction under section 266 of the Penal Code; a fraudulent intent must be charged and proved. REG. *v.* DAMO DHAR DALJI
[1 Bom., 181

GOVERNMENT *v.* KANGALEE MUDUK
[18 W. R., Cr., 7

WHARFINGER.

See BILL OF LADING.
[I. L. R., 4 Calc., 736

WHIPPING.

See SENTENCE—WHIPPING.
[Bourke, O. C., 269
5 Mad., Ap., 18
I. L. R., 5 Mad., 158

1. ——— **Juvenile offenders.**—*Act VI of 1864, s. 3.*—Section 3 of Act VI of 1864 (the Whipping Act) applies to juvenile as well as to adult offenders. REG. *v.* KUSA VALAD LAKSHMAN
[7 Bom., Cr., 70

2. ——— *First conviction of adults.—Substituted punishment.*—In the case of adults on a first conviction, or in the case of juvenile offenders whether for a first offence or otherwise, whipping can only be in lieu of, and not added to, any other punishment. QUEEN *v.* ABDOOL
[W. R., 1864, Cr., 38

QUEEN *v.* KANTIRAM . . 1 W. R., Cr., 24
QUEEN *v.* TONAOKOOH . 2 W. R., Cr., 63
QUEEN *v.* AMARUT . . 4 W. R., Cr., 20

3. ——— *Act VI of 1864.*—Under Act VI of 1864 (the Whipping Act), a juvenile offender means a person under the age of sixteen years. REG. *v.* MUHAMMAD ALI VALAD ABDUL ALI
[8 Bom., Cr., 9

4. ——— *Act XI of 1864, ss. 5, 10.—Criminal Procedure Code, s. 392.*—By the term "juvenile offender" in section 5, Act VI of 1864 (Whipping Act), is meant an offender under the age of sixteen years. *Reg.* v. *Muhammad Ali*, 8 *Bom., Cr., 9*, referred to. EMPRESS *v.* DIN ALI
[I. L. R., 6 All., 482

5. ——— **Sentence of whipping when allowable.**—*Act VI of 1864, s. 4.—Offence after previous conviction.*—The punishment of whipping under section 4, Act VI of 1864, can only be inflicted on a second conviction of a person who, having served a sentence of imprisonment, again commits a crime. QUEEN *v.* UDAI PATNAIK
[4 B. L. R., A. Cr., 5: 12 W. R., Cr., 68

6. ——— *Offence after previous conviction.—Previous conviction not shown.*—On a reference by a Sessions Judge under section 434 of the Criminal Procedure Code, a sentence of whipping in addition to one of rigorous imprisonment in the case of an offence specified in section 2 of Act VI of 1864 was annulled, as the offence was not committed after previous conviction. REG. *v.* SURYA BIN KRISHNA MANDAVKAR . 3 Bom., Cr., 38

REG. *v.* BABJI VALAD BAPU . 4 Bom., Cr., 5

7. ——— *Act VI of 1864, s. 3.—Second conviction for offence committed before first conviction.*—Section 3 of Act VI of 1864 (the Whipping Act) does not apply to cases in which the second conviction is for an offence committed previously to the first conviction. REG. *v.* KUSA VALAD LAKSHMAN . . . 7 Bom., Cr., 70

8. ——— *Previous conviction.*—A sentence of whipping founded on a previous conviction of the prisoner is only warranted where the subsequent conviction is for the same specific offence as that in respect of which the previous conviction applied. ANONYMOUS . 5 Mad., Ap., 1

ANONYMOUS . . . 5 Mad., Ap., 39

9. ——— *Theft in dwelling-house.—Act VI of 1864, s. 3.—Previous conviction of theft.*—A prisoner convicted of "theft in a dwelling-house" who has previously been convicted of "simple theft" is not thereby rendered liable to whipping, under Act VI of 1864, section 3. REG. *v.* CHANGIA VALAD SHUMIA . 7 Bom., Cr., 68

10. ——— *Act VI of 1864, s. 7.—Conviction of dishonestly receiving stolen property.—Previous conviction for theft.*—P. was convicted by a Magistrate of the first class of dishonestly receiving stolen property. He confessed on his trial that he had twice previously been convicted of theft. He was sentenced to be whipped, to be rigorously imprisoned, and, on the expiration of the term of imprisonment, to furnish security for good behaviour. *Held* that the offence of theft not being the same offence as that of dishonestly receiving stolen property, the punishment of whipping was illegal. EMPRESS *v.* PARTAP
[I. L. R., 1 All., 666

11. ——— *Conviction of separate offences.—"House-breaking to commit theft," and "theft."—Whipping Act, VI of 1864, s. 3.*—Where a prisoner convicted of "house-breaking in order to commit theft," and of "theft," both offences being portions of one continuous criminal act, was sentenced on the first head of charge to one year's rigorous imprisonment, under section 457 of the Penal Code, and on the second head of charge

WHIPPING.—Sentence of whipping when allowable—*continued.*

to receive twenty stripes, under section 2 of the Whipping Act (VI of 1864), the separate sentences (though not illegal) were disapproved of, as contrary to the spirit and intention of the Whipping Act. REG. *v.* GENU BIN AKU . . **5 Bom., Cr., 83**

12. ——— *Act VI of 1864, s. 7.—Conviction of theft.*—A sentence of whipping cannot, with reference to Act VI of 1864, section 7, be passed on a conviction for theft under section 379, Penal Code, as the former section only provides for sentences of imprisonment for a term not exceeding three years. QUEEN *v.* ESAN CHUNDER DEY **[21 W. R., Cr., 40**

13. ——— *Attempt at house-breaking with view to theft.*—In the case of a conviction of attempting to commit house-breaking by night with intent to commit theft, a sentence of whipping was annulled as being illegal. REG. *v.* YELLA VALAD PARSHIA . . **3 Bom., Cr., 37**

14. ——— *Substitution of whipping for other punishment.—Sentence.—Theft.*—Whipping may be substituted for any other punishment for the offence of theft in a dwelling-house. QUEEN *v.* JUNGHOO KHAN . **3 W. R., Cr., 36**

15. ——— *Act VI of 1864, s. 7.—Whipping in addition to other sentences.*—A sentence of whipping passed on a person who is already under sentence of death, or transportation, or penal servitude, or imprisonment for more than five years, is illegal. If the sentence of whipping precede, instead of follow, the other sentence, the passing of the latter sentence renders the infliction of the whipping illegal. ANONYMOUS CASE **[I. L. R., 1 Mad., 56**

16. ——— *Act VI of 1864. —Power of Magistrate.*—When a Magistrate, in exercise of the powers conferred by section 46 of the Criminal Procedure Code, 1861, passed a cumulative sentence against a person convicted at one and the same time of two or more offences punishable under the Penal Code,—*Held per* PEACOCK, *C. J.*, and PHEAR and SETON-KARR, *J J.*, that he could not, in addition to the penalties prescribed by the Penal Code, sentence the prisoner to whipping under Act VI of 1864; nor could he exceed twice the extent of his ordinary jurisdiction as defined by section 22 of the Criminal Procedure Code, 1861. *Held*, further, *per* SETON-KARR, *J.*, that, in the case of hardened offenders, a Magistrate can award whipping in addition to the maximum of imprisonment which he is competent to award. *Held per* MACPHERSON and JACKSON, *JJ.*, that the Magistrate may, in such case, in addition to awarding double the punishment which may be awarded for a single offence, award the punishment of whipping; but only one whipping can be awarded. NASSIR *v.* CHUNDER **[B. L. R., Sup. Vol., 951: 9 W. R., Cr., 41**

RUTTUN BEWA *v.* BUHUR. JHOWLA *v.* BUHUR **[14 W. R., Cr., 7**

WHIPPING.—Sentence of whipping when allowable—*continued.*

17. ——— *Act VI of 1864.—Penal Code, ss. 325, 342, 378.—Criminal Procedure Code (Act XXV of 1861), s. 46.—Cumulative sentences.*—Where the prisoner was convicted by the Magistrate of three distinct and separate offences, and was sentenced to a month's imprisonment for the offence of wrongful confinement under section 342, six months' imprisonment for the offence of voluntarily causing grievous hurt under section 325, and to whipping with twenty stripes for the offence of theft under section 378 of the Penal Code, it was held (KEMP and PHEAR, *JJ.*, dissenting) that the sentence was legal. Where a person is convicted at the same time of two or more offences punishable under the Penal Code,—*Held* (KEMP and PHEAR, *JJ.*, dissenting) that it is lawful for the Court, in addition to the penalties prescribed by the Penal Code, to sentence the prisoner to whipping. *Nassir* v. *Chunder, B. L. R., Sup. Vol., 951,* not followed. MANIRUDDIN *v.* GAUR CHANDRA SHAMADAR **[7 B. L. R., F. B., 165: 15 W. R., Cr., 89**

18. ——— *Magistrate of second class under Criminal Procedure Code, 1872.—Criminal Procedure Code (Act X of 1882), ss. 2 and 32.*—A person appointed a Magistrate of the second class under Act X of 1872 is incompetent, since the coming into force of Act X of 1882, to pass a sentence of whipping, unless he is specially empowered so to do according to the provisions of section 32 of the latter Act. EMPRESS *v.* BHAGVANTA RAVJI **[I. L. R., 7 Bom., 303**

19. ——— *Whipping in addition to imprisonment.—Criminal Procedure Code, 1872, ss. 305, 310.*—In passing a sentence of whipping in addition to six months' imprisonment, a Deputy Magistrate ordered that the prisoner should be brought before him at the termination of the imprisonment, and that the sentence of whipping should then be carried out. On the recommendation of the Sessions Judge (who referred to sections 305 and 310, Act X of 1872), the High Court cancelled the sentence of whipping as having become inoperative and incapable of being carried out. HUR CHUNDRA KULAL *v.* JAFER ALI . . . . **20 W. R., Cr., 72**

20. ——— **Grounds for sentence of whipping.**—*Statement of grounds in judgment.*—When a sentence of whipping is imposed the grounds for that punishment should be stated on the judgment. BADIYA *v.* QUEEN . **I. L. R., 5 Mad., 158**

21. ——— *Previous convictions, Proof of.—Kyfeut.*—As a rule, before flogging is given as an additional punishment, there ought to be formal evidence upon the record of the previous convictions relied on. The conviction and identity of the prisoner ought to be proved in the regular way: a mere kyfeut is no evidence whatever. QUEEN *v.* NUZEE NUSHYO . . . . . **15 W. R., Cr., 52**

22. ——— **Mode of infliction of sentence of whipping.**—*Stay of sentence, Grounds for.—Act VI of 1864, ss. 11 and 12.*—Meaning of the

WHIPPING.—Mode of infliction of sentence of whipping—*continued.*

words "execution shall be stayed" in Act VI of 1864, section 11. Sections 11 and 12 together mean that a man sentenced to whipping is not to be whipped unless in a fit state to bear it; the whipping should not be commenced, but if it be commenced it is not to be continued longer than the man is fit to bear it; and then the sentence has been satisfied, for it cannot be executed by instalments. ANONYMOUS [3 Mad., Ap., 1

23. ——— **Time after sentence within which whipping may be given.**—*Act VI of 1864, s. 9.*—A sentence of flogging cannot be carried out after the expiry of the limit of fifteen days from date of sentence provided in section 9 of Act VI of 1864. ANONYMOUS . 6 Mad., Ap., 38

This ruling was held to be applicable to section 310 of the Code of Criminal Procedure, 1872. ANONYMOUS . . . . . 7 Mad., Ap., 30

WIDOW.

See CASES UNDER HINDU LAW—ALIENATION—ALIENATION BY WIDOW.

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—FEMALES—WIDOW.

See CASES UNDER HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—WIDOW.

See CASES UNDER HINDU LAW—PARTITION—RIGHT TO PARTITION—WIDOW.

See CASES UNDER HINDU LAW—PARTITION—SHARES ON PARTITION—WIDOW.

See CASES UNDER HINDU LAW—REVERSIONERS.

See CASES UNDER HINDU LAW—STRIDHAN.

See CASES UNDER HINDU LAW—WIDOW.

See PRE-EMPTION—RIGHT OF PRE-EMPTION . . I. L. R., 1 All., 452
[I. L. R., 6 All., 17
I. L. R., 7 All., 860

——— **Power of alienation.**

See CASES UNDER HINDU LAW—WIDOW—POWER OF WIDOW—POWER OF DISPOSITION OR ALIENATION.

——— **Power of disposition of—**

See CASES UNDER HINDU LAW—WIDOW—POWER OF WIDOW—POWER OF DISPOSITION OR ALIENATION.

——— **Purchase by—**

See BENAMI TRANSACTION — ONUS OF PROOF . . 6 B. L. R., 303

——— **Refusal or omission to adopt.**

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—SPECIAL CASES OF CONSTRUCTION—OMISSION OR REFUSAL TO ADOPT . . 3 B. L. R., O. C., 85

WIDOW—*continued.*

——— **Rights of—**

See MAHOMEDAN LAW—INHERITANCE.
[I. L. R., 3 Calc., 702
17 W. R., P. C., 108
11 Bom., 104

WIDOWS INHERITING JOINTLY.

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—FEMALES—WIDOW.
[I. L. R., 1 Mad., 290
1 Bom., 66
1 Ind. Jur., O. S., 59
3 Mad., 288, 424
I. L. R., 2 Mad., 194
I. L. R., 7 All., 114

See HINDU LAW—PARTITION—RIGHT TO PARTITION—WIDOW.
[I. L. R., 1 Mad., 290
3 Mad., 424
6 B. L. R., 134
I. L. R., 2 Mad., 194

WIFE.

See CASES UNDER HINDU LAW—CONTRACT—HUSBAND AND WIFE.

See CASES UNDER HINDU LAW—PARTITION—RIGHT TO PARTITION—WIFE.

See CASES UNDER HINDU LAW—PARTITION—SHARES ON PARTITION—WIFE.

See HUSBAND AND WIFE.

——— **Action for harbouring—**

See RESTITUTION OF CONJUGAL RIGHTS.
[I. L. R., 1 Bom., 164

——— **Custody of—**

See HABEAS CORPUS . 13 B. L. R., 160

See HINDU LAW—GUARDIAN—RIGHT OF GUARDIANSHIP . . 23 W. R., 178

See MAHOMEDAN LAW—CUSTODY OF WIFE . . . 5 B. L. R., 557
[13 B. L. R., 160

——— **Evidence of, against husband.**

See EVIDENCE—CRIMINAL CASES—HUSBAND AND WIFE.
[B. L. R., Sup. Vol., Ap., 11
7 Bom., Cr., 50

——— **Maintenance of—**

See CASES UNDER HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—WIFE.

——— **separated from husband, Liability of, for debts.**

See HINDU LAW—CONTRACT—HUSBAND AND WIFE . I. L. R., 1 Bom., 121

WILD ANIMALS.

1. ——— **Animals feræ naturæ.**—*Escape of wild animals kept in confinement.*—*Return*

WILD ANIMALS.—Animals feræ naturæ —*continued.*

or pursuit of such animals. — Wild animals are no longer the property of a man than while they continue in his keeping or actual possession; but if they regain their natural liberty, his property ceases until they have a mind to return, which is only to be known by their usual custom of returning, or are instantly pursued by their owner, for during such pursuit his property remains. CHYTUN CHURN DOSS *v.* COLLECTOR OF SYLHET . . **21 W. R., 75**

2. ———— *Capture of wild elephant.—Right of owner of land where captured.—Right of finder.*—A wild elephant having fallen into a pit made by *K. N.* in his own land, was secured, removed, and tamed by *U. M.*, without the leave of *K. N.* *Held* that *K. N.* was the captor, and that *U. M.* acquired no property in the elephant. MAKATH UNNI MOYI *v.* MALABAR KANDAPUNNI NAIR **[I. L. R., 4 Mad., 268**

3. ———— *Escaped elephant.* —*Ownership.—Recapture.*—A tame female elephant escaped from her master's field in company with a herd of wild elephants and resumed her natural wild habits. The owner-plaintiff abandoned his search after two months, and then offered a reward of R200 to any person who should recapture her. At the end of four months she was recaptured by the defendant, who was compelled to tame her in the same way as if she had been an ordinary wild elephant. Plaintiff offered the reward of R200 to the defendant and demanded the elephant, but the demand was refused. *Held* that under the circumstances the plaintiff had lost all claim to the animal. PEAL *v.* CAMPBELL **[3 C. L. R., 515**

WILL.

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1. EXECUTION	6196
2. ATTESTATION	6196
3. FORM OF WILL	6199
4. NUNCUPATIVE WILL . . .	6200
5. VALIDITY OF WILL	6200
6. INSPECTION OF WILL . . .	6201
7. RENUNCIATION BY EXECUTOR .	6201
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See CHARITABLE BEQUEST.
[I. L. R., 1 Calc., 303
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See DOMICILE . **I. L. R., 4 Calc., 106**

See CASES UNDER HINDU LAW—WILL.

See LAND TENURE IN CALCUTTA.
[1 Moore's I. A., 305, 399

See CASES UNDER MAHOMEDAN LAW—WILL.

See MORTGAGE—FORM OF MORTGAGES.
[I. L. R., 1 All., 753

See CASES UNDER PROBATE.

WILL—*continued.*

———— Exemplification of—

See SUCCESSION ACT, s. 237.
[8 B. L. R., Ap., 76

———— Revocation of—

See HINDU LAW—WILL—NUNCUPATIVE WILLS . **I. L. R., 3 Calc., 626**

See SUCCESSION ACT, s. 56.
[I. L. R., 1 Calc., 158

———— Suit by person claiming under—

See CIVIL PROCEDURE CODE, 1882, s. 50.
[I. L. R., 6 Bom., 73

———— Statement of value of property in—

See EVIDENCE—CIVIL CASES—RECITALS IN DOCUMENTS . **I. L. R., 1 Bom., 561**

1. EXECUTION.

1. ———— Succession Act, s. 50.*—Signature of testator.—Nature of execution required.*—To entitle the executor to probate, the signature of the testator must be that of a conscious person, and not the results of mere mechanical movement of the hand. KALEE TARA DOSSIA *v.* NOBIN CHUNDER KUR . . . . . **21 W. R., 84**

2. ATTESTATION.

2. ———— Directions as to attestation. —*Succession Act, s. 50.—Probate.*—An unprivileged will will not be recognised by the Court and admitted to probate unless executed in accordance with the directions contained in Part VIII, Act X of 1865, such directions being imperative and not merely declaratory. *Held* that the words "in the presence of the testator," in clause 3 of section 50 of the Succession Act, may receive the same construction that has been put upon them in the English Courts, but cannot receive larger interpretation. ESAIAS *v.* GABRIEL **[3 N. W., 32**

3. ———— Presence of witnesses.*—Succession Act (X of 1865). s. 50.*—Where the testator does not himself sign the will, but some other person signs it in his presence and by his direction, then, besides this other person, there must be two witnesses who must sign the will in the presence of the testator. *In the goods of Roymoney Dossee, I. L. R., 1 Calc., 150;* and *Hurro Sundari Dabia* v. *Chunder Kant Bhuttacharjee, I. L. R., 6 Calc., 17,* cited. IN THE MATTER OF THE PETITION OF HEMLOTA DABEE **[I. L. R., 9 Calc., 226**

S. C. GRISH CHUNDER BANERJEE *v.* HEMLOTA DEBI . . . . **11 C. L. R., 359**

4. ———— Attesting witness.*—Succession Act, s. 50.—Signature made for testator by party afterwards attesting.*—The person making the signature of a will for the testator is not competent as an attesting witness of its execution under the provisions

WILL—*continued.*

2. ATTESTATION—*continued.*

Attesting witness—*continued.*

of the Succession Act. *In the goods of Bailey, 1 Curt., 914;* and *Smith* v. *Harris, 1 Rob., 262,* distinguished. IN THE GOODS OF NANABHAI SORABJI MESTRI. AVABAI *v.* PESTANJI NANABHAI

[11 Bom., 87

5. ——— **Mode of attestation.**—*Execution of will.—Wills Act, XXV of 1838, s. 7.*—Section 7 of the Wills Act, XXV of 1838, enacts "that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned: (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." A testator signed his will in the presence of a witness who subscribed it in his presence, and some time afterwards, upon the arrival of another witness, the testator, in the joint presence of the former witness and the other subscribing witness, acknowledged his subscription at the foot of the will. The second witness then subscribed the will, and the first witness in his and the testator's presence acknowledged his subscription but did not re-subscribe. *Held* by the Judicial Committee (affirming the decision of the Supreme Court at Calcutta) that the requirements of the Act had not been sufficiently complied with; it being necessary that both witnesses should be jointly present at the same act of the testator and jointly subscribe it in his presence. CASEMENT *v.* FULTON

[3 Moore's I. A., 395

6. ——— **Acknowledgment of signature by testator.**—It is a sufficient acknowledgment by a testator of his signature to his will if he makes the attesting witnesses understand that the paper which they attest is his will, though they do not see him sign it, or observe any signature to the paper which they attest, provided that the Court is satisfied that the testator's signature was on the will when the witnesses attested it. MANICKBAI *v.* HORMASJI BOMANJI . . I. L. R., 1 Bom., 547

7. ——— **Sufficiency of attestation.**—*Succession Act (X of 1865), s. 50.—Probate.—Hindu Wills Act (XXI of 1870), s. 2.*—By the Succession Act, section 50, no particular form of attestation is necessary: therefore, where, to a document purporting to be her last will and testament, the name of the testatrix was written by *A.*, and the testatrix then in his presence affixed her mark, and *A.* in her presence wrote beneath it "by the pen of *A.*," and the testatrix was then identified to the Registrar, who was present, by *B.*, who had seen her affix her mark to the document, and who in her presence put his signature as having identified her,—*Held* a sufficient attestation; and probate was granted. IN THE GOODS OF ROYMONEY DOSSEE . I. L. R., 1 Calc., 150

WILL—*continued.*

2. ATTESTATION—*continued.*

Sufficiency of attestation—*continued.*

8. ——— *Grant of probate.—Signature.—1 Vict., c. 26 (Wills Act), s. 9.—Succession Act (Act X of 1865), s. 50.*—To the will of *A.*, a British-born subject and a member of the Bengal Civil Service, who died in India possessed of personal property only, a native servant of the testator, purporting to attest the will, appended words in the Persian character signifying "this is *A.'s* signature." *Held*, on an application for probate, that this was not a sufficient subscription of the will. *Semble*, —A signature by mark would be a sufficient signature to a will by a witness under the Succession Act. IN THE GOODS OF WYNNE . . 13 B. L. R., 392

9. ——— *Succession Act (X of 1865), s. 50.—Hindu Wills Act (XXI of 1870), s. 2.*—Section 50 of the Succession Act (X of 1865) clearly intends that the two attesting witnesses to a will shall sign their names after the testator or testatrix shall have executed the will. *Bissonath Dinda* v. *Doyaram Jana, I. L. R., 5 Calc., 738;* and *Fernandez* v. *Alves, I. L. R., 3 Bom., 382,* followed. If a testatrix admits a signature on a will to be hers before a Registrar of Assurances, and is identified before him by one of the witnesses to the signature, and both the Registrar and the identifier sign their names as witnesses to the admission made,—*Held* that such an attestation would be sufficient to satisfy section 50 of Act X of 1865. *In the goods of Roymoney Dossee, I. L. R., 1 Calc., 150,* followed. IN THE MATTER OF THE PETITION OF HURRO SUNDARI DABIA. HURRO SUNDARI DABIA *v.* CHUNDER KANT BHUTTACHARJEE

[I. L. R., 6 Calc., 17: 6 C. L. R., 303

10. ——— *Attesting witness, when he should sign.—Succession Act (X of 1865), s. 50.*—The signatures of two or more attesting witnesses to a will required by section 50 of the Succession Act (X of 1865) must be attached to the will after, and not before, the testator's signing or affixing his mark to it. *Quære,*—Whether a will can be properly attested by a marksman. BISSONATH DINDA *v.* DOYARAM JANA

[I. L. R., 5 Calc., 738: 5 C. L. R., 565

11. ——— *Succession Act (X of 1865), s. 50.—Witness.—Signature.—Mark.*—The direction contained in section 50, clause 3, of the Succession Act (No. X of 1865) as to the signature of witnesses attesting an unprivileged will, is not satisfied by the witnesses affixing their marks. It is necessary for the validity of a will that the actual signature, as distinguished from a mere mark, of at least two witnesses should appear on the face of the will. FERNANDEZ *v.* ALVES

[I. L. R., 3 Bom., 382

12. ——— *Will attested by marksmen.—Witness.—Signature.—Mark.—Succession Act (X of 1865), s. 50.*—The direction contained in section 50, clause 3 of the Succession Act, as to each of the witnesses signing the will,

WILL—*continued.*

2. ATTESTATION—*continued.*

Sufficiency of attestation—*continued.*

is not satisfied by the witnesses affixing their marks, and it is necessary for the validity of a will that the signature, as distinguished from a mere mark, of at least two witnesses, should appear on the will. *Fernandez* v. *Alves, I. L. R., 3 Bom., 382,* followed; *In the goods of Wynne, 15 B. L. R., 392,* dissented from. If a testator, on presenting his will for registration, admits a signature on the will to be his before a Registrar, and is identified before him by a witness, and both the Registrar and the identifier sign their names on the will as witnesses to the admission of the testator, such attestation is sufficient to satisfy the requirements of clause 3 of section 50, Act X of 1865. *In the matter of Hurro Sundari Dabia, I. L. R., 6 Calc., 17,* followed. NITYE GOPAL SIRCAR *v.* NAGENDRA NATH MITTER . **I. L. R., 11 Calc., 429**

13. ——— Repudiation of signature by attesting witness.—The mere fact of an attesting witness to a will repudiating his signature does not invalidate a will, if it can be proved by the evidence of other witnesses of a reliable character that he has given false evidence. If he does repudiate it uncontradicted, the mere fact of there being two witnesses purporting to have witnessed the testator's signature is not a compliance with section 50 of the Succession Act. NUBO KISHORE DOSS *v.* JOY DOORGA DOSSEE . . . **22 W. R., 189**

14. ——— Forged attestations, Effect of.—*Effect on title given under genuine portion of will.*—*C.,* under a power given to her by the will of *L.*, her husband, a Hindu, sold certain land to *R.* After the sale certain forged attestations were added to the will. In a suit brought by the heir of *L.* to recover the property sold by *C.* to *R.*, *R.* relied on the will which was produced by other defendants in the suit. *Held* that *R.'s* title could not be affected by the forgery. PARAMMA *v.* RAMACHANDRA **[I. L. R., 7 Mad., 302**

3. FORM OF WILL.

15. ——— Buddhist will.—*Probate.*—*Succession Act (X of 1865), s. 331.*—Probate may be granted of the will of a Buddhist made after the 1st January 1866. It is not necessary that the will of a Buddhist should be executed according to the formalities prescribed by the Succession Act. IN THE MATTER OF KOKYA DINE **[2 B. L. R., A. C., 79: 10 W. R., 417**

16. ——— Testamentary document.—*Will to have effect on contingency.*—*Probate.*—*A.*, being ill and away from home, wrote to his brother *B.* certain directions as to the management of his property, and concluded: "Brother, if I die of this sickness and *C.* survive me, then whatever property I have you will give one half to *C.*," &c. In another and subsequent letter he wrote to *B.*: "I don't think that the illness I am now suffering from will terminate fatally; but in case I should die, then you will give to *C.* one half of my Company's papers," &c.

WILL—*continued.*

3. FORM OF WILL—*continued.*

Testamentary document—*continued.*

"I appoint you turney (executor) in all matters relating to *C.*," &c. *A.* recovered from the fever, but died suddenly a year later, without having made any other testamentary disposition of his property. In a suit brought by *B.* as executor of *A.*, according to the tenor of these documents, against the widow of *A.*, for the purpose of having probate of them granted to him as of the will of the deceased,—*Held* (reversing the judgment of MACPHERSON, *J.*) that the documents were only intended to have a testamentary effect in the event of *A.'s* having died of the sickness he was suffering from at the time of writing, and therefore probate which had been granted by the Court at the original hearing was ordered to be brought in and cancelled. KAMEENEE DOSSEE *v.* BISSONATH GHOSE . **2 Ind. Jur., N. S., 6**

17. ——— Codicil.—*Probate, Application for.*—*Document referring to will.*—After letters of administration with the will annexed had been granted, the administrator found a book containing memoranda in the testator's handwriting, made after the date of the will, and directing certain dispositions of his property. One entry referred in express terms to the will. The testator was a domiciled Scotchman. *Held,* on a petition by the administrator, asking that the memoranda might be admitted to probate, that the memoranda were not testamentary documents, and the petition was therefore dismissed. IN THE GOODS OF WEMYSS **[I. L. R., 4 Calc., 721**

4. NUNCUPATIVE WILL.

18. ——— Validity of nuncupative will.—*Roman Catholics of Portuguese extraction.*—*Intestate succession.*—*Quære,*—Whether a Roman Catholic of Portuguese extraction can, under the law current amongst members of that church in Chittagong, take under a nuncupative will; and if not, to what is a wife entitled under the law regulating succession of intestates amongst members of that church? REBEIRO *v.* REBEIRO . **3 W. R., 63**

5. VALIDITY OF WILL.

19. ——— Military testamentary document.—*Application for probate.*—*Lapse of time.*—*Invalidity of will.*—A military testament valid in its inception may be deprived of its privilege by lapse of time. IN RE GODBY . **1 Hyde, 196**

20. ——— Will of Cutchi Memon.—*Will disposing of ancestral property.*—Wills made by members of the Cutchi Memon community, whereby the testators disposed of property which was proved to be ancestral,—*Held* to be invalid. MAHOMED SIDICK *v.* AHMED. ABDULA HAJI ABDSATAR *v.* AHMED . . . **I. L. R., 10 Bom., 1**

21. ——— Will of East Indian testatrix out of civil jurisdiction of High Court.—*English law.*—The provisions of the English law.

WILL—*continued.*

5. VALIDITY OF WILL—*continued.*

Will of East Indian testatrix out of civil jurisdiction of High Court—*continued.*

as to the administration of and succession to the estate of a British subject dying testate apply to the will of an East Indian testatrix (the illegitimate daughter of a Mahomedan woman) who resided and died without the limits of the ordinary civil jurisdiction of the High Court. HOGG *v.* GREENWAY. GREENWAY *v.* HOGG

[Cor., 97: Bourke, A. O. C., 111

22. ——— **Will procured by importunity of wife.**—*Succession Act, s. 48.—Undue influence.*—The wife of the testator persuaded him to execute a will in supersession of a former will less favourable to her, but the influence which she exerted was not such as to deprive the testator of the exercise of his judgment and volition. *Held* that the conduct of the wife did not amount to undue influence. MORISON *v.* ADMINSTRATOR GENERAL OF MADRAS . . . I. L. R., 7 Mad., 515

23. ——— **Proof of genuineness of will.**—*Registration and attestation.*—When a document propounded as a will is proved to have been executed and registered by the alleged testator, it is still essential to inquire into the circumstances connected with its execution and registration, when the will is inofficious and there are other suspicious matters connected with it. KISTO CHURN MOJOOMDAR *v.* DWARKA NATH BISWAS . . 10 W. R., 32

6. INSPECTION OF WILL.

24. ——— **Practice.**—*Application by next of kin of deceased.*—The Court, on the application of one who is next of kin of a deceased Hindu, ordered a person in possession of an alleged will of the deceased to bring in and deposit the same with the officer of the Court for the purpose of being inspected, and a copy thereof taken by such applicant. IN THE GOODS OF BALKRISHNA GANPATJI . 1 Bom., 114

7. RENUNCIATION BY EXECUTOR.

25. ——— **Procedure after renunciation.**—*Proof of execution of will in Court.—Administration accounts.*—A Hindu testator empowered his executor to lay out such portion of his estate as the executor might think fit towards charitable purposes, and did not dispose of the residue of the estate. The executor renounced, and no probate of the will or letters of administration, with the will annexed, was granted. In a suit by the testator's sole heiress for construction of the will and for administration, the Court allowed the execution of the will to be proved in Court, declared that it was void for uncertainty, and directed the usual administration accounts to be taken. SUBBOMUNGOLA DABEE *v.* MOHENDRONATH NATH . I. L. R., 4 Calc., 508

WILL—*continued.*

8. CONSTRUCTION.

26. ——— **Rules of construction.**—*Intention of testator.—Meaning of "purchase."*—The rule of construction applicable to a will is that words in general are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another can be collected. If the language of a will is perfectly unambiguous and precise, it cannot be strained for the purpose of giving effect to what possibly might have been the intention of the testator, but is not expressed or implied in the terms of the testament. *G.*, by a clause in his will, gave his wife a life-interest in the house in his possession, and in those which he might afterwards "purchase." In *G.'s* lifetime his younger brother died, and *G.* thereby acquired a house by inheritance. *Held*, there being nothing to show that *G.* had used the word "purchase" in any other than its ordinary sense, that the language of the will could not be strained in order to give effect to what possibly might have been the testator's desire had he foreseen the death of his younger brother in his own lifetime, but was not expressed or implied in the terms of the testament, and that the house did not pass, under the will, to the testator's widow. GEORGE *v.* GEORGE

[6 N. W., 219

27. ——— **Effect of words excluding from inheritance.**—*Heir-at-law.—A.*, a Parsi inhabitant of Surat, died there on the 13th February 1879, leaving him surviving the following relations, *viz.:* A daughter *J.* (the respondent) by his first wife, who had predeceased him; his second wife Dhanbai, who lived apart from him; his third wife, who had been divorced by him, and whose son *A.* he did not recognise as his own; and his three sisters *D.*, *S.*, and *G.*, the first-named of whom had been married to *K.*, and whose son *E.* was the appellant. By his will *A.* expressly directed that neither his daughter *J.* nor his widow Dhanbai should take any share of his property, the whole of which he bequeathed to his brother *R.*, who, however, predeceased him. *Held* that the use of mere negative words, unaccompanied by any effective disposition of his property, could not exclude his daughter *J.* or his widow Dhanbai from succeeding to their shares of the estate. ERASHA KAIKHUSRU *v.* JERBAI

[I. L. R., 4 Bom., 537

28. ——— **Commission of manager of estate how calculated.**—*Intention of testator.*—Other questions disposed of in the Court of first instance having remained undecided by the High Court, which dealt with the question of jurisdiction alone, were considered with reference to whether there had or had not been shown any good reason for reversing or varying the order of the original Court. Among these, the question whether the manager's commission was to be calculated on the gross rental of the estate, or on the income divisible among the sharers, was held to be settled by the indication of the latter mode of calculation in the will. ORDE *v.* SKINNER

[I. L. R., 3 All., 91: 7 C. L. R., 295
L. R., 7 I. A., 197

WILL—*continued.*

8. CONSTRUCTION—*continued.*

29. ——— Armenian will.—*Devise.—Absolute estate.—Estate for life.*—An Armenian, by his will in the Bengali language, made a gift to his son in the following terms: "I bequeath to *A.* as salamati my talooks (which he named) and R6,000 in cash. He shall enjoy the profits of the aforesaid talooks. On his demise his sons shall get. The mooktears shall make over to the satisfaction of *A.*" *Held* that the will was to be construed according to equity and good conscience, and not according to English law. The rule applicable was that, unless a contrary intention appeared, the estate given was an absolute one. *A.* took an absolute estate under the devise. BROUGHTON *v.* POGOSE
[12 B. L. R., 74: 19 W. R., 181

30. ——— Superstitious uses, English law against.—*Application of English law to India.—Semble,*—The English rule of law which prohibits the bequest of money for superstitious uses has no application in India. JUDAH *v.* JUDAH
[5 B. L. R., 433

31. ——— Bequest for performance of Masses.—*Validity of bequest.*—A bequest in a will of a sum of money for the performance of masses in Calcutta is valid. ANDREWS *v.* JOAKIM
[2 B. L. R., O. C., 148

32. ——— *Validity of bequest.—Gift to superstitious uses.*—A bequest by a Roman Catholic of Portuguese descent, born and domiciled in Calcutta, for the performance of masses, is not a gift to superstitious use. DAS MERCES *v.* CONES
[2 Hyde, 65

33. ——— Legacy to attesting witness.—*Succession Act, s. 54.*—A legacy to the attesting witness of a will is void under section 54 of the Succession Act, whether or not the attestation of the witness is indispensable to the validity of the will. ADMINISTRATOR GENERAL *v.* LAZAR
[I. L. R., 4 Mad., 244

34. ——— Legacy to minor.—*Absolute gift.—Discretion of executor.*—Where there is an absolute bequest and power to executor to delay making over the legacy at discretion,—*Held* that, on attaining majority, the legatee should at once be put in possession. DE SILVA *v.* DE SILVA
[1 Ind. Jur., N. S., 16: Bourke, O. C., 281

35. ——— Domestic servant.—*Legacy, Suit for.—Sirang.*—The testator, a Hindu, made a will in the English form and language, in which he bequeathed (*inter alia*) as follows: "To each of my domestic servants in Calcutta who shall have been in my service ten years and upwards at the time of my death R100 for every rupee of monthly salary drawn by them from me respectively." The plaintiff had been in the service of the testator for about forty years as sirang on board a steamer which the testator kept on the river, and in which he used to visit his zemindaries and perform other journeys by water. The plaintiff was in the habit of daily attending at the

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Domestic servant—*continued.*

testator's residence, and there obeying any orders that might be given him. If the steamer was not needed, the plaintiff used to attend at the testator's residence from early in the morning to about one in the afternoon, returning to take his meals and stop on board the steamer. *Held* that he was entitled to take under the legacy as a domestic servant of the testator. DHANNO SIRANG *v.* UPENDRA MOHAN TAGORE . . . . 8 B. L. R., 244

36. ——— *Washerman.—Held* on the evidence, that the plaintiff had failed to prove he was a domestic servant of the testator, so as to entitle him to take a legacy under this clause. BHIM DAS *v.* UPENDRA MOHAN TAGORE
[9 B. L. R., Ap., 4

37. ——— Husband and wife.—*Trustee.—Sole use and benefit.* A testator made the following bequest in his will: "I give, devise, and bequeath to my dearly-beloved wife all the stock-in-trade, furniture, mourning coaches, horses belonging thereto, stones, marbles, tools, implements, and materials connected with my trade and business, and all my right and interest therein; and after payment of my debts and other expenses, I give, devise, and bequeath the rest and residue of my outstandings and collections for her sole use and benefit, with liberty to continue and carry on such trade and business." The testator's widow married a second husband, and they carried on the business of the deceased together. They afterwards separated, and she brought a suit against her husband for a declaration of her right under the will, and for an account from her husband of the profits, &c., of the business during their marriage. *Held* (reversing the decision of the Court below) that, on the true construction of the will, the stock-in-trade, &c., was not bequeathed to the wife for her sole and separate use independent of any future husband; her husband did not become a trustee for her in respect of such stock-in-trade or the profits of the business, and he was not bound to render an account. ORD *v.* ORD
[4 B. L. R., O. C., 53

38. ——— Charitable bequest.—*Bequest for spiritual benefit.—Uncertainty.—Superstitious uses.—N. E. J.,* a Hebrew merchant domiciled in Calcutta, and possessed of both real and personal property, died, leaving a will, by which, after appointing his mother, *K. E. J.,* and his brother, *J. E. J.,* executrix and executor thereof, and making various bequests and provisions, he made the following bequest of the residue of his property: "And what may remain after payment of the above-mentioned sums, as well as the debts, shall remain under the control of my brothers, *S. E. J.,* and *J. E. J.,* for the purpose of defraying therewith the expenses for the year, and making charitable distributions as commanded, and giving alms for my spiritual benefit according to their judgment." *Held,* assuming that the High Court should act in conformity with the English Court of Chancery in carrying out charitable

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Charitable bequest—*continued.*

bequests, that, as far as the bequest related to giving of alms for the testator's spiritual benefit, it was void for uncertainty. The "defraying expenses and making charitable distribution" were limited by the bequest to the year within which the testator died. JUDAH *v.* JUDAH . . **5 B. L. R., 433**

39. ———— *43 Eliz., c. 4.*—*Mortmain, Statutes of.—Hospital.—Clause prohibiting alienation.*—A testator left his personal property to trustees in trust to pay thereout certain annuities to his son and daughter, and, after bequeathing some pecuniary legacies, devised certain immoveable property to the trustees in perpetuity in trust for the support of hospitals in the North-West Provinces, with directions that the surplus income (if any) from his personalty during the lives of his children, and on the death of either of them, his or her annuity, and on the death of both of them, the whole income of the personalty, should be applied in support of the hospitals. The will also contained a provision that the property should never be sold. In a suit for the construction, and for declaration of the trusts, of the will, it appeared that the income of the personalty was not more than sufficient, after payment of the legacies, to pay the annuities to the testator's children, and that the immoveable property was greatly in need of repairs and did not produce enough for the support of the hospitals, or to enable the trusts of the will relating thereto to be carried out. *Held* that the devise for the support of the hospitals was a valid devise, and one to which the Court would give effect, as being a charitable trust within the scope of 43 Elizabeth, Cap. 4. The Statutes of Mortmain not appliying to India, the Court will carry out such a trust when the subject is immoveable property, just as it would if it had been personal property. *Held* also that, if the prohibition against sale were a valid one, the Court could not order a sale merely because it would be advantageous to the charity that the property should be sold; but *held* that the prohibition against sale was void as being repugnant to the devise, and, notwithstanding such prohibition, the trustees had power to sell, or otherwise alienate, the property for the purpose of maintaining the hospitals. BROUGHTON *v.* MERCER **[14 B. L. R., 442**

40. ———— *Void bequests.*—*Uncertainty.*—"*Surplus.*"—*General residuary bequest.*—A testator by his will directed as follows: "I do hereby direct my trustee to feed the really needy and poor at Gopeenathjee out of a separate expense out of my estate, to be contributed to the worship of Lukeejonardunjee, my ancestral goddess. I do direct my trustee to spend suitable sums for the annual sradhs or anniversaries of my father, mother, and grandfather, as well as of myself after my demise, for the performance of the ceremonies and the feeding of the Brahmins and the poor; to spend suitable sums for the annual contribution and gifts to the Brahmins, Pundits holding tolls for learning in the country at the time of the

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Charitable bequest—*continued.*

Doorga Pooja; to spend suitable sums for the perusal of Mohabharat and Pooran and for the prayer of God during the month of Kartick. Should there be any surplus after the above expenditure, then I do hereby direct my trustee to spend the said surplus in the contribution towards the marriage of the daughters of the poor in my class and of the poor Brahmins, and towards the education of the sons of the poor amongst my class, and of the poor Brahmins, and other respectable castes, as my trustee will think fit to comply." *Held* that the gifts were valid testamentary bequests, and that the words "should there be any surplus after the above expenditure" created a general residuary bequest. *Held*, on appeal (affirming the decision of the Court below), that a general residuary bequest was created by the concluding words of the clause, which would absorb any of the preceding bequests, if they should happen to be invalid. *Quære*,—Whether the bequests to pundits holding *tolls*, and for the reading of the Mohabharat and Pooran and for prayer to God, were valid. DWARKANATH BYSACK *v.* BURRODA PERSAUD BYSACK . . . **I. L. R., 4 Calc., 443**

41. ———— *Cyprès, Doctrine of.*—A testatrix bequeathed the interest of a Government promissory note to "The Calcutta Armenian Orphans' College Funds for the Relief and Enjoyment of the Poor Families, Widows, Orphans, and Schools of the Armenian Nation," to be received half-yearly by the wardens of the funds for the time being. Although there was a charity in Madras, called "The Armenian Orphans' College," there was none in Calcutta or elsewhere answering the description of the Calcutta Armenian Orphans' College, but there were two, and only two, charitable institutions in Calcutta which provided for the relief and enjoyment of the poor families, widows, orphans, and schools of the Armenian nation. Of these, one, the Church of St. Nazareth, distributed money amongst, and gave relief to, the poor families, widows, and orphans of the Armenian community; and the other, the Armenian Philanthropic Academy, educated gratuitously the poor and orphans of the same community. The note was invested by order of the Court, and there had been a large accumulation of interest thereon. Ths governors of the two institutions concurred in asking that each should receive a moiety of the accrued and future interest of the fund. *Held* that the *cyprès* doctrine applied; that the accumulated interest should remain invested; but that the accruing interest on the accumulated fund should be paid half-yearly, one moiety to the wardens of St. Nazareth's Church, and the other to the managers of the Armenian Philanthropic Academy. LONGBOTTOM *v.* SATOOR . . . . . **1 Mad., 429**

42. ———— *Gift.*—*Cyprès, Doctrine of.*—*Lapse of legacy.*—*Costs.*—Under the will of *A.*, who appointed the Administrator General of Bengal his executor, *B.* had a life-interest in the residue of the testator's estate. *B.* brought a suit against the Administrator General to have it declared

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Charitable bequest—*continued.*

that a pecuniary legacy, given under the will, had lapsed and fallen into the residue. Prior to the hearing it was agreed between *B.* and the Administrator General that the costs of the suit should come out of the testator's estate; this agreement was embodied in a consent order obtained on the application of the plaintiff. The suit was dismissed, and this decision was affirmed on appeal. On the question of costs,—*Held* that the estate of the testator not being before the Court, the agreement as to costs could not be carried out, and that the plaintiff must pay the costs of all parties to the suit. MALCHUS *v.* BROUGHTON . . . . **I. L. R., 13 Calc., 193**

43. ———— *Appointment of trustee.—Failure to carry out wishes of testator.*—Where a testator had made a bequest for charitable purposes, and had made no express provision for the management of the charitable trust so created, except by directing that, in the event of his heirs failing to carry out his wishes in respect of the trust fund, the Civil Court should take the fund and the management of the trust summarily into its own hands,—*Held* that, in the absence of misconduct, the widow, and not the Collector, was the proper person to be appointed trustee. HORI DASI DABI *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL **[I. L. R., 5 Calc., 228: 4 C. L. R., 77**

44. ———— **Children.**—*Domicile.—Rules for interpretation.—Accretions to property from rents.*—Where a testator has an ascertained domicile, the construction of his will must depend on the law of that domicile; but if no particular law is applicable, the will is to be interpreted by principles of natural justice. In such cases, in applying the rules of Hindu, Mahomedan, or English law to the wills of Hindus, Mahomedans, or East Indian Christians respectively, their particular habits and modes of life may be looked to as a guide to the interpretation. From the context of the will and surrounding circumstances, "children" may be interpreted as illegitimate children. Where by the will the income of estates was left to devisees for life, with a gift over of the *corpus* on their death, and a portion of the income, instead of being divided among the tenants-for-life, was applied to the purchase of other estates,—*Held*, those estates did not pass to the remaindermen, but formed the absolute property of the tenants-for-life, and passed to their devisees. BARLOW *v.* ORDE . . **5 B. L. R., 1: 13 W. R., P. C., 41**
[13 Moore's I. A., 277

45. ———— **Contingent gift.**—*Puttro poutradi, Meaning of.—Absolute estate.*—A Hindu, *B. L. M.*, died in 1874, leaving a widow, *K. K. D.*, a daughter's daughter, *H. D. D.*, and a brother, *R. L. M.*, with whom he was on bad terms. By his will, which was made on the 9th of August 1870, and at a time when there was no reason to abandon all expectation of his leaving male issue of his own, *B. L. M.* directed that, in the event of his dying without leaving a son, grandson, or son's grandson, his widow

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Contingent gift—*continued.*

K. K. D. should take the whole of his estate *according to the shastras*, and enjoy the profits thereof for her life, and that on her death, in the event of a daughter or daughters having been born to him, then she or they, and on the death of her or them, then her or their son or sons (the testator's daughter's sons) should in like manner take and become the owner or owners of the estate *according to the shastras*; and that in the event of there being no daughter or daughter's son of the testator living at the time of the death of his widow, then his grand-daughter (daughter's daughter) *H. D. D.* should take the whole estate absolutely from generation to generation (puttro poutradi); and that, in the event of no son or daughter being born to the testator after the execution of his will, and of his grand-daughter (daughter's daughter) *H. D. D.* dying childless, or being a barren or childless widow, or otherwise disqualified, then the whole of his property should go to the Government, to be employed by it for charitable and philanthropic purposes. The main object of the testator *B. L. M.* in making this disposition of his property was admittedly to exclude *R. L. M.* from the inheritance. *Held* that *H. D. D.*, if she survived the testator's widow *K. K. D.*, and was not then a barren or childless widow or otherwise disqualified, would take, not a life-interest, but an absolute estate, to the exclusion of *R. L. M.* *Held*, also, that the words "puttro poutradi" had generally the effect of defining the estate given as an estate of inheritance, and did not by themselves necessarily denote that the estate given was to be one descendible to heirs male only. *Held*, also, that in case of *H. D. D.* not surviving *K. K. D.*, or of her being at the time of the death of *K. K. D.* for any reason disqualified from taking the estate, then upon the death of *K. K. D.* the gift to the Government of the reversion to the exclusion of *R. L. M.* would take effect, and was a good and valid gift. HORI DASI DABI *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL **[I. L. R., 5 Calc., 228: 4 C. L. R., 77**

46. ———— *Gift to children on their attaining 21.*—Where words of contingency form part of the description of the class of persons to take, as in the case of a gift to those "who shall attain the age of 21," the words must receive their natural construction, and no estate vests in any one till he attains the prescribed age. In such a case there must be something in the context pointing to a different construction, or something in the will inconsistent with the literal construction, to justify a Court in adopting any but the literal construction. In the case of words of contingency occurring in the description of the class of persons to take, a mere gift over is not sufficient to change their meaning. BALLIN *v.* BALLIN **[I. L. R., 7 Calc., 218: 8 C. L. R., 28**

47. ———— *Period of distribution.—Survivorship.*—*A.*, a Hindu, made the following provisions by his will: "I have two sons living, *B.* and *C.*; they, and an infant son of my

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Contingent gift—*continued.*

eldest son, the late *D.*, and my wife *E.* (four persons), shall succeed to the whole of my estate: these four persons will receive equal shares. If any of these four persons happen to die, which God avert, the survivor of them will receive this estate in equal shares; but if there be a son or a grandson surviving as the heir and representative of the party dying, such survivor shall succeed to his share: if there be a daughter or grand-daughter in the female line surviving, such survivor shall receive a share of the property; the expense of the marriage of such female child only shall be defrayed out of the estate:" and also provided that "so long as my infant grandson shall not have attained his majority, the whole of my estate shall remain undivided." All the persons named survived the testator. *Held* that they took absolute interests in the shares named, and that the estate became divisible on the infant son of *D.* attaining majority. ELLOKASSEE DOSSEE *v.* DURPONARAIN BYSACK . **I. L. R., 5 Calc., 59**

48. ——— *Vesting of estate in executor.—Directions to executors, Effect of.*—A testatrix, after appointing certain persons to be executors of her will in respect of the whole of her property, directed that they should "take possession of the whole of her property, and keep the same under their protection;" that they should pay out of her estate the charges of interment, &c.; that they should repair four houses annually out of the income thereof, having let them out to hire, and, after paying taxes and ground-rent, divide the proceeds every three months between the testatrix's two sons; that the executors should not give the rents to the creditor, because the bequest of the income to the sons was "not an entire gift to them, but a mere provision for their support." The will proceeded as follows: "Should my son *M.* happen to die before the decease of his wife, then I give the share of *M.* to his widow *H. M.*, &c., and after the death of *H. M.*, should my son *M.* not have left any legitimate male child, then I give the above share to my son *J.*, &c. After the death of *M.* (and his wife), should he have left legitimate male children, such male children shall in the same manner receive the income once in every three months till they attain the age of 21 years, and then the amount of their share shall be divided into equal portions, and each of them having become the owner of his portion shall receive the same from my executors; but if *H. M.* die before *M.*, and *M.* die without having had legitimate male children, then I give and bequeath the shares of my son *M.* to my son *J.* as a provision for his support, &c. If my sons *M.* and *J.* die without having male issue, and if their wives—that is to say, *H. M.* and *C. J.*—die without having male issue begotten by my sons, then I give my garden, &c., actually and entirely to the sons and daughter of my daughter *G.*, begotten by her first husband, *G. A.*,—that is, to *A. M. B.* and *N.*, or in case of their death, to their sons and daughters lawfully begotten, or to such of them as shall survive at the time. My said garden shall be divided into equal shares, and each of them having received his share in equal proportion as a legacy from me, shall enjoy the same." *M.*, and *H. M.* his wife, died without having left any children; *J.* died in the lifetime of *M. A.*, and one of the sons of *G.* died without leaving children in the lifetime of *H. M. Held, firstly,* that the direction to the executors to lease the property indefinitely and out of the income to make repairs, pay taxes and ground-rent, and apply the rent to the maintenance of the sons, was sufficient to vest the legal estate in the trustees. *Secondly,*—that such estate was an estate in fee. *Thirdly,*—that the children of *G.* took equitable estates in remainder in fee, defeasible in case of their death in the lifetime of the first taker for life, in which event there was substituted a devise to their children in fee. *Fourthly,*—that the children of *G.* took as tenants in common, and not as joint tenants, and therefore, that as there was nothing from which cross remainders between the children of *G.* could be implied, the share of *A.* reverted to the heir-at-law of the testatrix. *Fifthly,*—that wherever any estate in fee is devised to a trustee in trust without any limitation of the estate of the *cestui que trust*, the latter takes the beneficial estate in fee. SHIRCORE *v.* ADMINISTRATOR GENERAL . . . . **1 Ind. Jur., O. S., 50**

49. ——— *Gift to children.*—A testator, after providing for payment of debts, &c., directed that the whole of his property should be disposed of and the proceeds placed in the Oriental Bank, with power to the executors to invest the same in mortgages, and to leave existing mortgages untouched. The will then contained this direction: "That a monthly stipend of ₹15 be paid to my daughter *E. S.* for her own benefit, and ₹20 for the benefit of her two children (during their minority), and in the event of the demise of any of the said children occurring, the sum of ₹10 to cease rateably as being the allowance for each child; that on each of the children attaining their age of majority, I request that my executors pay to each of them severally and proportionably the full amount of interest accruing from my estate (the existing provision for my two daughters to continue during their natural life), and after their demise the said interest in like manner to revert to their heir or heirs in succession." *Held, firstly,*—that a direction to pay a monthly stipend to *E. S.* and *M. D.* respectively was simply a charge upon the testator's estate to pay the said stipends to *E. S.* and *M. D.* for their respective lives. *Secondly,*—that *E. S.* and *M. D.* were severally entitled during the lifetime and minority of their children to a monthly stipend of ₹10 in respect of each child, such payment to cease upon the death of each child or on its attaining majority, till which latter event the said children took no interest under the will. *Thirdly,*—each child upon attaining its majority took a share of the residue, proportioned to the number of children then living, and a contingent proportionate interest in the shares of each of the other children which would become vested on the death of each one dying under twenty. *Fourthly,*—

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Contingent gift—*continued.*

the limitation of the gift "during their natural life and after their demise, the said interest in like manner to revert to their heir or heirs in succession," did not prevent the children from taking their several shares absolutely under the will. *Semble*,—The rule in *Wild's case, 6 Rep., 17*, is not applicable to personalty. AGNEW *v.* MATHEWS

[1 Ind. Jur., O. S., 74: 1 Mad., 17

50. ——— **Absolute gift.**—*Restriction on legatees.—Enjoyment.—Residuary estate.*—Where a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment to secure certain objects for the benefit of the legatee, and where such objects fail, the absolute gift prevails, and does not fall into the residue of the testator's estate. Therefore, where a testator gave legacies to certain of his grandsons and granddaughters, but nevertheless declared that such legacies should be held upon trust (as to the legacies to the grandsons) to invest the same and to apply the income during the minority of the legatee towards his maintenance and education, and upon his attaining the age of 21 years to pay him the income during his lifetime, and after his death to pay such income unto the widow of such grandson, and after the death of both of them to transfer the capital unto the child or children of such grandson as being a son or sons should attain the age of 21 years, or being a daughter should attain that age or marry, in equal shares as tenants-in-common; and where the testator especially provided as to the legacy left to one grandson that upon the happening of certain events it should be paid to his other grandchildren,—*Held* that the gift to the grandsons were absolute, and that the subsequent provisions were simply a qualification of the gifts for the benefit of the legatees; and that, therefore, upon the death of one of the grandsons unmarried, his legal representative was entitled to the legacy left to him. ADMINISTRATOR GENERAL OF BENGAL *v.* APCAR

[I. L. R., 3 Calc., 553

51. ——— **Proviso for cesser.**—*Condition.—Conditional limitation.—Breach of condition.—Residence.*—*P. C. T.*, a Hindu, died leaving an only son, *G. M. T.*, and having first made his will in the English form, whereby, after declaring that he had already made sufficient provision for his son *G. M. T.*, and that *G. M. T.* was to take nothing under the will, he gave all his property to trustees, upon trust, as to the personal estate, "to collect and get in the same" with certain specified exceptions, and thereout to pay his funeral expenses and debts, "and such legacies as were not by the will postponed in payment;" and to invest the residue, and out of the annual proceeds of such investments, so far as the same would extend, to pay certain annuities and postponed legacies as they became due, and to pay such surplus income as might from time to time exist to the person entitled to the beneficial enjoyment of the real property or the surplus rents or profits thereof, with an ultimate trust, after all the

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Proviso for cesser—*continued.*

legacies and annuities had been satisfied, for the person or persons entitled to the beneficial enjoyment of the real property. And as to the realty, upon trust, until all the debt and legacies had been paid, and all the annuities had fallen in, to receive the rents, and thereout in the first instance to pay the unsatisfied legacies and annuities, and to pay the surplus rents to the person or persons for the time being to whom the real estate (subject to the devise to the trustees) was given by the will. And as a first charge on the net income of the real property (after satisfying the expenses of establishments), the testator directed the trustees to pay R30,000 per annum to the person for the time being entitled to the beneficial enjoyment of the real property or the surplus income thereof. He further directed them, after all the annuities and legacies had fallen in and been satisfied, to convey the real estate, so far as the then condition of circumstances would permit, unto and to the use of the person entitled, under the limitations contained in the will, to the beneficial interest therein. The first limitation was to *J. M. T.* for life. At the end of the limitations of the real estate, the will contained the following proviso: "Provided always, and I hereby declare that, if any devisee, or tenant-for-life . . . shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and to use as his residence in Calcutta, the said baithakhana, house and premises where I now reside, and make use of and enjoy my library, horses, carriages, farmyard, furniture in the said house, and jewels, gold and silver plates, &c., in my use or possession, then, and immediately thereupon, the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed," as if the person committing a breach of such conditions had then died. The testator died in August 1868. In December 1868 his son *G. M. T.* instituted a suit for the purpose of avoiding and setting aside the trusts and limitations of the will, except so far as they were for payment of debts, legacies, and annuities. This suit was dismissed on the 1st of April 1869. *G. M. T.* appealed, and on the 1st September 1869 the Appeal Court declared him to be absolutely entitled to the personalty, subject to the trusts for payment of debts, legacies, and annuities, and entitled, on the death of the defendant *J. M. T.*, the tenant-for-life, to the realty. *J. M. T.* and others claiming under the limitations in the will, appealed to the Privy Council; and *G. M. T.* filed a cross-appeal, in which he claimed that the gift of the life-estate to *J. M. T.* ought to be declared void. By the order of Her Majesty in Council, which was dated the 9th August 1872, and which arrived in Calcutta in September 1872, all the limitations after the limitation to *J. M. T.* were declared void and inoperative, and it was further declared that *J. M. T.* was beneficially entitled to a life-interest in the realty, and also in the personalty directed to be conveyed or converted into a fund,

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Proviso for cesser—*continued.*

subject to the payments in the will directed to be made, and to the provisions in the will not thereby declared to be void; and also, until the legacies and annuities fell in and were satisfied, to R2,500 a month out of the net rents of the realty, and also to the surplus rents of the same and the surplus interest of the personalty; and that, upon the failure or determination of *J. M. T.'s* life-interest, *G. M. T.* was entitled as heir-at-law to the real and personal property. The proviso for cessor was not among the provisions of the will which were declared void. *J. M. T.* was one of the trustees under the will. After the testator's death the business of the estate continued, as theretofore, to be carried on in a portion of the baithakhana house: and *J. M. T.*, who had a family dwelling-house of his own, used, up to November 1869, to attend at the baithakhana daily for the transaction of business. In November 1869 *J. M. T.* quarrelled with his co-trustees, and ceased to go to the baithakhana. In April 1870 he demanded from the other trustees that possession of the baitakhana should be given to him, and upon their insisting on the right to occupy the portion of the baithakana used for the purpose of the estate business, sued them for possession. In July 1870 a decree for possession was made in his favour. The trustees appealed, and ultimately, in July 1871, the Appellate Court made a declaration that it was consistent with the trusts of the will that *J. M. T.* should enter into possession; and the trustees were ordered to deliver to him possession of the baithakhana, except the portion of the ground-floor occupied for the business of the estate. After obtaining his decree, *J. M. T.* found that the baithakhana was in a very bad state of repair, and called upon the trustees to have proper repairs executed. On their refusal to do so, except under direction of the Court, *J. M. T.*, in December 1871, brought a suit to compel them to effect necessary repairs: the trustees contested the suit, but in March 1872 a decree was passed directing them to make the repairs. Subsequently repairs were begun, which were completed in October 1872. In a suit by *G. M. T.*, alleging that *J. M. T.* had committed a breach of one or more of the conditions contained in the proviso for cessor, by not residing in the baitakhana house and by neglecting to keep it in repair, and had thereby incurred a forfeiture of which the plaintiff was entitled to take advantage,—*Held*, that the clause containing the provisions for cesser and shifting of the estate was intended to come into operation as a whole and not piecemeal, and, therefore, that until *J. M. T.* came into full beneficial enjoyment of the life-estate given him by the will, or at all events until he became entitled to the surplus rents, the time had not arrived when that clause was intended to apply. *Held*, further, that, assuming that such time had arrived, the action of the plaintiff in contesting the right of *J. M. T.*, under the will, to occupy the baitakhana house and premises, debarred him from claiming that effect should be given to the clause of forfeiture for non-residence. Even apart from any action by the plaintiff, the conduct of the trustees in disputing the right of *J. M. T.* to possession of a portion of the baitakhana house, and refusing to repair, would suspend the operation of the forfeiture clause until October 1872, inasmuch as it prevented him until that time from obtaining such a possession as was contemplated by the forfeiture clause. The forfeiture clause was not brought into operation by the judgment and order of the Judicial Committee of 9th August 1872. *Held*, on the evidence, that *J. M. T.* had complied with the conditions as to residence. GANENDRO MOHUN TAGORE *v.* JUTTENDRO MOHUN TAGORE . . . . . **12 B. L. R., 1**

On appeal to the Privy Council,—*Held* that as the clause provided for the cesser and determination of the life-interest of *J. M. T.* in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over had been declared to be void, would cease when that event happened. *Held* that the clause could not be construed so as virtually to defeat it, and therefore it must be held to be operative before the trusts of the will were at an end, and *J. M. T.'s* estate perfected by a conveyance. But held on the evidence that there had been no breach of the condition contained in the clause. The delay in not residing before October 1872 was not unreasonable. Where, in a condition of residence, no manner or period of residence is prescribed, but residence simply, and without definition, exclusive residence is not supposed to be meant; in such cases the occasional use of a house and keeping an establishment in it with the intention of again using it as a residence, is a sufficient compliance with the condition. GANENDRO MOHUN TAGORE *v.* JUTTENDRO MOHUN TAGORE . **14 B. L. R., 60: 22 W. R., 377 [L. R., 1 I. A., 387**

52. ——— Power of appointment.—*Execution of power.—Marriage settlement.*—A testator, after giving certain specific bequests, disposed of his property as follows: "I request that the interest of my property, invested in Government securities, be disposed of from time to time as follows:—*First*,—to my dear son *A.* two shares; to my two dear daughters *B.* and *C.* each one share; the interest t be paid to them quarterly or half yearly as may b most convenient. *Second*,—I request that these shares shall not be transferable during their lifetime. *Third*,—at the demise of any of my children without issue, any such share to be divided in the above proportion to the survivors. *Fourth*,—in the event of issue, they may bequeath their share to any one of their children they may select, subject to the above conditions." *C.* married in 1874, and, by a settlement made in consideration of the marriage, her share was assumed to be assigned to trustees upon certain trusts. In 1875 *C.* and her husband made the following joint will: "We. do hereby constitute the survivor of us to be executor or executrix in our estate and sole heir of the same, together with the child or children begotten in our marriage." *C.* died shortly after the execution of the above will leaving one child. In a suit by *C.'s* husband and the trustees of the settlement of 1874 for the administra-

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Power of appointment—*continued.*

tion of the testator's estate and for the construction of his will,—*Held* that the settlement of 1874 could not operate upon *C.'s* share in consequence of the direction of the testator, that it should not be transferred in the lifetime of *C.*, and that the plaintiffs took nothing under the settlement. *Held*, also, that the power of appointment given by the will of the testator had not been properly exercised by the joint will, and that the child of *C.* took the whole of her mother's share. FEHESEN *v.* SIMPSON

[I. L. R., 4 Calc., 514

53. ——— **Gift in remainder expectant on termination of estate for life.**—*Devise of talook.—The Oudh Estates Act, I of 1869.—Registration.—Acceleration of remainder on failure of life-estate.*—A gift in remainder expectant on the termination of an estate for life, does not fail, but is accelerated, by reason of the gift of such prior life estate not taking effect. The principle of the decision in *Lainson* v. *Lainson, 5 De Gex, M. & G., 754: 18 Beav., 1*, held applicable to a will made by a Hindu testator. A talookdar, whose talook was entered in the third of the six lists prepared in conformity with section 8 of "The Oudh Estates Act," I of 1869, devised his estate by a will, which was not registered, to one of his wives for life, and after her death to his younger son by her. *Held*, as a consequence of the above rule, that it was not necessary to decide, upon a claim by the elder son as heir-at-law, whether the widow, as a person "who would have succeeded to an interest" in the talook, if the talookdar had died intestate, would have been within the exception, in reference to the effect of non-registration of will contained in section 13 of the same Act. AJUDHIA BAKSH *v.* RAKMAN KUAR

[I. L. R., 10 Calc., 462: L. R. 11 I. A., 1

54. ——— **Vesting of interest.**—*Divesting.—Executory trust.*—*H.*, by his will, bequeathed to his daughter *A. M. H.* "on her attaining her 18th year, the sum of Company's ₹10,000, with any interest that may have accrued thereon, if she marries, to be settled upon herself and children solely; should she die unmarried, her money to be equally divided between her brothers; and if either of them die, the whole of deceased's money to go to the survivor." *Held* that *A. M. H.* (who had attained her 18th year) had a vested interest in the legacy subject to be divested upon her dying at any time unmarried, and further, subject to an executory trust in favour of her children in the event of her marrying at any time, and therefore that she was not entitled to have the capital of the legacy paid to her. IN THE MATTER OF THE WILL OF HUNTER. IN THE MATTER OF ACT XXVIII OF 1866 . . . I. L. R., 4 Calc., 420

55. ——— *Interest not subject to be divested.*—A testator nominated *A. B.*, &c., "to be executors and trustees of this my will, and eventually guardians of my dear children and estate, until such time as my children shall severally attain

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Vesting of interest—*continued.*

the age of 25 years, when I request the aforementioned gentlemen (my wife being dead), their heirs or executors, will divide, or cause to be divided, into shares agreeably to the number of our surviving children, giving to the boys two shares and to each of the girls one, or to their lawful issue or husband, the whole of my estate, each child to be put in possession of his or her share when they shall respectively attain the age of 25 years; and whenever either of my daughters shall enter into the holy state of matrimony, I request that a proper settlement may be made upon her and her children, and in the event of either of my children departing this life without leaving husband, wife, or lineal descendants, his or her share shall be divided equally amongst our other children or their lawful issue; but on no account shall any division of the principal of my estate take place till after the death of their mother. *Held* (reversing the decision of PHEAR, *J.*) that after the mother's death, each child took a vested interest on attaining the age of 25 years,—that is, at the time when possession is to be given,—and not an interest subject to be divested in the event of the child dying without husband, wife, or lawful issue. TAYLOR *v.* PHILLOTT. PHILLOTT *v.* MORRIS

[1 Ind. Jur., N. S., 375

56. ——— *Divesting clause; —Gift over on legatee's death "prior to division" of the estate.—Gift not void for uncertainty.—Act X of 1865 (Succession Act) ss. 75, 91, 106.*—A testator directed his trustees and executors to hold his real and personal estate upon trust, to sell the real estate either together or in parcels, and either by public auction or private contract, and to call in, sell, and convert into money such part of his personal estate as should not consist of money, and to divide the said moneys, and the ready money which might belong to such estate, amongst the several persons named in the schedule to the will, and to pay the same to them in the shares and proportions therein mentioned, as and when they should respectively attain the age of 21 years in the case of males, or, in the case of females, when they should respectively attain that age or marry. He directed that, in the event of any of such persons dying in his life-time, or at any time thereafter "prior to the said division," leaving lawful issue, such issue should be entitled to the share which their deceased parent would have taken. One of the legatees who had attained the age of 21 years at the testator's death, died five months after him, before payment of the legacy, and left lawful issue. *Held* that the legacy vested in interest in the legatee at the testator's death, but that the legatee having died prior to the division of the estate, it became divested; that the "division" of the testator's estate meant, in this will, the ascertainment of the amounts allottable to the share of each legatee, after the conversion of the estate into money; and that the gift over in favour of the legatee's issue was not void for uncertainty, but took effect. *Johnson* v. *Crook, L. R., 12 Ch. D., 639; Collison* v. *Barber, L. R., 12*

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Vesting of interest—*continued.*

Ch. D., 834; Bubb v. *Padwick, L. R., 13 Ch. D., 517; Chaston* v. *Seago, L. R., 18 Ch. D., 218; Spencer* v. *Duckworth, L. R., 18 Ch. D., 634,* referred to. BACHMAN *v.* BACHMAN . I. L. R., 6 All., 583

57. ——————— *Bequest to orphan in Military Orphan Asylum.—Direction to trustees.*—A special case was stated for the opinion of the Court, as to whether *S. M.* took a vested interest in the sum of R6,325, under the following clause of will: "I paid to the M. O. Society R6,000 for *S. M.*, and invested R6,826, the interest on which I directed to be paid to the mother of *S. M.* Now I direct my trustees, after the death of the mother of *S. M.*, to realise the latter sum and pay it to the M. O. Society, for *S. M.*, in terms of the regulations of the Society." *Held* that the bequest was *primâ facie* for the benefit of the daughter. That, having regard to the regulations of the M. O. Society, the bequest was a gift for the benefit of the Society generally. That if the will had given the mother the interest for life, instead of saying it had been given, it would have vested. That the interest vested in *S. M.* at once, and formed part of her estate. IN THE MATTER OF THE GOODS OF COLLINS . . . . Bourke, O. C., 104

58. ——————— **Trust.**—*Creation of trust.—Uncertainty.*—A Hindu by his will, after appointing certain persons executors for the purpose of managing his estate after his death, gave them the following directions: "You should give my brothers, their wives and children, according to your wishes." *Held* that no trust was created by these words. KUMARASAMI *v.* SUBBARAYA

[I. L. R., 9 Mad., 325

59. ——————— *Validity of trust.—Direction as to debt due from attesting witness.*—Where a testator directed that a debt due to him by an attesting witness of his will should not be claimed, demanded, or enforced, but that his wish was that the sum should be specially devoted to the education of the children of such attesting witness,—*Held* that there was no release of the debt or legacy to the attesting witness, but a valid trust in favour of the children. ADMINISTRATOR GENERAL *v.* LAZAR

[I. L. R., 4 Mad., 244

60. ——————— *Precatory trust.*—*W. R.*, by his will, made the following gift to his wife, *M. A. R.*: "I give to my dearly beloved wife the whole of my property both real and personal (described) feeling confident that she will act justly to our children in dividing the same when no longer required by her." *M. A. R.*, by her will, left to their children certain portions of such property, leaving to their child *A. C. R.*, amongst other things, certain banking shares. These shares were attached in the execution of a decree against the executors to her estate as belonging to such estate. *Held* by the High Court that she took under her husband's will a life interest only in his property with a power of appointment in favour of the children, and that the

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Trust—*continued.*

shares belonged to *A. C. R.*, and could not be sold in execution of the decree as part of the estate of *M. A. R.* RAYNOR *v.* MUSSOORIE BANK

[I. L. R., 2 All., 55

Held by the Privy Council, reversing the decision of the High Court, that the widow took an absolute interest in the property, and that no trust for the benefit of the children was created. In order to create a precatory trust the words must be such that the Court finds them to be imperative on the first taker of the property; and the subject of the gift over must be well defined and certain. MUSSOORIE BANK *v.* RAYNOR

[I. L. R., 4 All., 500: L. R., 9 I. A., 70

61. ——————— **Expression of wish.**—*Bequest.*—A testatrix, entitled to Government notes under a gift, coupled with the condition that she was to receive only the interest during her life, and that, after her death, the notes were to be held in trust for all her heirs, gave the following directions to *S. K.*, whom she made her principal legatee: "I direct *S. K.*, under this will, to pay every month R644-1-7 (being one third of R1,933-5-4, my monthly pay allowed by the Government for notes, which are deposited) to my dependants and personal servants, as detailed below. . . . . Be it known, that the expenses of the imambarra, &c., will be continued for ever; and also the pay of *G. K.* and *M. A.* will be defrayed for ever, *i.e.*, generation after generation. The rest of the servants will be paid for life only." *Held* that these words constituted a bequest, and were not merely the expression of a wish. Also, that the bequest was not one of legacies payable out of a specified sum and no other; the statement that the monthly payments to be made amounted to one third of the sum received monthly by the testatrix, not limiting the source of the legacies. SULEMAN KADR *v.* DORAB ALI KHAN

[I. L. R., 8 Calc., 1: L. R., 8 I. A., 117

62. ——————— **Will confirming trust-deed.**—*Construction of deed.—Forfeiture.*—*S.*, being desirous of securing and settling his property, executed a deed of trust whereby he conveyed and assigned all his real and personal property unto trustees, upon (among others) the following trusts: that immediately after his death the trustees should convey, assign, transfer, and make over all the premises mentioned in the deed unto such person or persons as *S.* should, by his last will, attested by two witnesses, direct and appoint, and in default of such direction and appointment, unto the next heirs of *S.*, their heirs and assigns, for ever, and in the meantime to pay the Government revenue out of the rents and profits of the real property, and employ the residue and accumulations as well as the produce and accumulations of the personal property "in such a manner as may procure the daily worship of the household idols" mentioned in the deed, and pay what they considered a fair and proper sum to the wives and family of *S.* living at his death and residing in the family dwelling-house. By his will, dated

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Will confirming trust deed—*continued.*

the same day as the deed, *S.* declared that he ratified and confirmed the deed, subject to such provisions as were contained in his will, which were that the trustees should not charge the fund for the maintenance of those who should not live in the family dwelling-house and for the appointment of new trustees. *Held*, first, upon the authority of *Wilson* v. *Pigott*, 2 *Ves. Jun.*, that the powers of the trustees (under the deed) did not cease on the death of *S.*, and that the directions in the will, although not strictly within the words, amounted to a good appointment in equity, so that instead of the trustees of the deed conveying the property on the death of *S.* to his son, they should contrive to hold subject to the trusts of the deed as modified by the will. *Secondly*,—that the words "in such a manner as may procure the daily worship," &c., meant in such manner as shall be sufficient to procure the daily worship, &c., and that the trustees were not authorised to apply such portion of the trust funds as they in their discretion might think fit, but only such portion as was reasonably sufficient for those purposes. General debts and liabilities are not charges against property forfeited upon conviction of felony. HURRYDOSS BONERJEE *v.* HOGG (ADMINISTRATOR GENERAL OF BENGAL) . . . **1 Ind. Jur., O. S., 86**

63. ——— Gift of residue to a class.—*Postponement of period of distribution.—Vested interests.—Succession Act, ss. 98, 101, 102.*—A testator gave his residuary estate to trustees upon trust to invest and "to pay, transfer, or divide the same unto, between, or among the children of my brothers *A.* and *B.* respectively, to be paid, transferred to, and divided among them in the proportions and at the times hereinafter mentioned,—that is to say, the share of each and every son of my said two brothers shall be double that of each and every daughter, and the shares of each son shall be paid to him or them respectively upon his or their attaining the age of 21 years, and the share of each daughter to be paid to her or them on her or their respectively attaining that age or previously marrying, with benefit of survivorship between and among all the said sons and daughters." The testator left him surviving his two brothers and a sister, *C. A.* and *B.* both died before the eldest of the testator's nephews or nieces attained 21 or married. In a suit instituted by the widow and executrix of *A.* to have it declared that the above bequests were void under sections 101 and 102 of the Succession Act, and the testator died intestate as to the residue of his estate, and that she as executrix of *A.* was entitled to receive a one-third share of the said estate, and the accumulations thereof,—*Held* that the legatees took vested interests subject to be divested on death before the contingencies mentioned in the will happened; that the period of distribution alone was postponed; and that the bequests were valid. *Semble*,—Section 98 of the Succession Act applies only to vested interests. MASEYK *v.* FERGUSSON . . . **I. L. R., 4 Calc., 304**

64. ——— *Postponement of period of distribution.—After-born child, Share of*

WILL—*continued.*

8. CONSTRUCTION—*continued.*

Gift of residue to a class—*continued.*

—*Lapsed bequest.—Succession Act, s. 98.*—A testator gave his residuary estate to trustees upon trust, to invest and "to pay, transfer, or divide the same unto, between, or among the children of my brothers *A.* and *B.* respectively, to be paid, transferred to, and divided among them in the proportions and at the times hereinafter mentioned,—that is to say, the share of each and every son of my said two brothers shall be double that of each and every daughter, and the shares of each son shall be paid to him or them respectively upon his or their attaining the age of 21 years, and the shares of each daughter to be paid to her or them on her or their respectively attaining that age or previously marrying, with benefit of survivorship between and among all the said sons and daughters." After the death of the testator, and before the period of distribution arrived, a son was born to *B.*, and one of the sons of *A.* died intestate and unmarried. *Held* that the after-born son of *B.* was entitled to a double portion as one of the male children of the testator's brother, and that the share of the son of *A.* was divisible among the surviving male and female children in equal shares. MASEYK *v.* FERGUSSON . . . **I. L. R., 4 Calc., 670**

65. ——— Residuary estate of moveable and immoveable property.—*Claims to, against executors and trustees.*—If a testator appoints persons to be his executors and trustees, and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take that estate, though there be no express devise to them. TREEPOORASOONDERY DOSSEE *v.* DEBENDRONATH TAGORE . **I. L. R., 2 Calc., 45**

WILLS ACT (XXV OF 1838).

——— s. 3.—*Application of Act.—East Indians domiciled out of the jurisdiction of High Court.*—The Wills Act, XXV of 1838, applied to the wills of East Indians, whether domiciled within or beyond the testamentary jurisdiction of the High Court. HOGG *v.* GREENWAY . . **2 Hyde, 3**

Held, on appeal, the Wills Act only applied where the High Court had an exclusive jurisdiction analogous to that of the Ecclesiastical Court in England. It did not apply in the case of a person who was not entitled by birth or domicile to have applied to him the actual law of England. Therefore it did not apply to the case of an East Indian testatrix (the illegitimate daughter of a Mahomedan woman) who resided and died outside the limits of the ordinary civil jurisdiction of the Court. GREENWAY *v.* HOGG. HOGG *v.* GREENWAY **[Bourke, A. O. C., 111: Cor., 97**

WINDOWS OR DOORS, SUIT TO CLOSE—

See CASES UNDER JURISDICTION OF CIVIL COURT—PRIVACY, INVASION OF—

See TRESPASS—GENERAL CASES.

[3 B. L. R., A. C., 411

WITHDRAWAL FROM PROSECUTION.

See PUBLIC PROSECUTOR.
[I. L. R., 8 All., 291

WITHDRAWAL OF SUIT.

See APPELLATE COURT—OBJECTION TAKEN FOR FIRST TIME ON APPEAL—SPECIAL CASES—WITHDRAWAL OF SUIT.
[I. L. R., 3 All., 528

See COMPROMISE—REMEDY ON NON-PERFORMANCE OF COMPROMISE.
[Agra, F. B., 1

See DIVORCE ACT, s. 35.
[9 B. L. R., Ap., 6

See PRACTICE—CIVIL CASES—AFFIDAVITS.
[3 Bom., O. C., 55

See PRACTICE—CIVIL CASES—WITHDRAWAL OF SUITS OR APPEALS . Cor., 67
[I. L. R., 7 Bom., 287

See RELINQUISHMENT OR OMISSION TO SUE FOR PORTION OF CLAIM.
[I. L. R., 1 All., 324

It was formerly held in some cases that the power to allow withdrawal of suits given by the Civil Procedure Code (section 97 of Act VIII of 1859) was not applicable to suits under the Rent Act, 1859.

DOYAL CHUNDER GHOSE *v.* DWARKANATH MISSER
[Marsh., 148: W. R., F. B., 47
1 Ind. Jur., O. S., 41: 1 Hay, 347

MODHOO SOODUN MULICK *v.* PANCH COWREE MULICK . . . . . 7 W. R., 302

BEER CHUNDER JOOBRAJ *v.* TARINEE CHURN ROY . . . . . 11 W. R., 46

RAMANATH DUTT *v.* JOYKISHEN MOOKERJEE
[11 W. R., 3

In other cases rent suits were held not to be excluded. RAM CHARAN BYSAK *v.* HARVEY
[2 B. L. R., S. N., 11: 10 W. R., 373

WOOMANATH ROY CHOWDHRY *v.* SREENATH SINGH . . . . . 15 W. R., 260

Since the Bengal Rent Act, 1869, however, the procedure in rent suits has been, and is now, the same as in any other suits.

1. ——— Sanction for fresh suit.—*Act VIII of 1859, s. 97.*—Civil Courts had no power to sanction the bringing of a fresh suit, except under section 97, Act VIII of 1859. ARGOON SINGH *v.* HUREE HUR SINGH . . . 14 W. R., 472

ANUND MOHUN PAUL CHOWDHRY *v.* RAM KISHEN PAUL CHOWDHRY. GOBIND CHUNDER PAUL CHOWDHRY *v.* RAMKISHEN PAUL CHOWDHRY
[2 W. R., 297

2. ——— Leave to one of several co-plaintiffs to withdraw.—*Consent of co-plaintiff.*—*Civil Procedure Code, 1877, s. 373.*—The proviso in the third clause of section 373 of the Code of Civil Procedure does not deprive the Court of power to permit one of several co-plaintiffs to withdraw unconditionally from a suit even though his co-plaintiffs do not consent to his withdrawal. MOHAMAYA CHOWDHRAIN *v.* DURGA CHURN SHAHA
[9 C. L. R., 332

3. ——— Withdrawal with consent of defendant.—*Civil Procedure Code, 1859, s. 97.*—*Right to bring fresh suit.*—A plaintiff filed a plaint for an account to be taken. The plaintiff withdrew the plaint, without the permission of the Court to withdraw from the suit, with liberty to bring a fresh suit. This was done for the purpose of a submission to arbitration under a deed mutually executed between the plaintiff and defendant. The deed was not acted upon. *Held*, reversing the decision of MACPHERSON, *J.*, that the plaintiff was not debarred by section 97 of Act VIII of 1859 from bringing a fresh suit to establish the agreement for reference to arbitration, and also for the account, which was a relief to which he was entitled. The section only applied to cases where the plaintiff withdraws from the suit without the consent of the defendant. JUGGOBUNDO CHATTERJEE *v.* WATSON & Co. . . . . Bourke, A. O. C., 162

S. C. in Court below . Bourke, O. C., 250

4. ——— Withdrawal of claim under s. 230, Act VIII of 1859.—*Right to bring subsequent suit.*—In a suit to recover the possession of land of which the plaintiff had been dispossessed in execution of a decree against the first defendant, it appeared that the plaintiff had applied within one month from the date of his dispossession to the Court from which the process of execution had issued under section 230 of the Code of Civil Procedure, setting up his title, and it was numbered and registered as a suit under the section. Before the claim came on for hearing, the plaintiff was allowed by the Court to withdraw the proceeding, with liberty to bring a fresh suit upon the claim set up. The plaintiff subsequently brought the present suit. *Held* that the former proceeding was a suit within the meaning of section 97 of the Code, and liberty having been given on its withdrawal before decree to bring another suit, the present suit was well brought. SUBBARAMIEN *v.* PONNUSAWMY CHETTY . . 5 Mad., 298

5. ——— Substitution of assignee of plaintiff's rights and allowing him to withdraw.—*Power of Court.*—*Civil Procedure Code, 1859, s. 97.*—Where the Court allowed the purchaser of the plaintiff's rights to be substituted for him and then permitted him to withdraw the suit,—*Held* it was an order not within section 97, and one which the Court had no power to make. JUDOOPUTTEE CHATTERJEE *v.* CHUNDER KANT BHUTTACHARJEE
[9 W. R., 309

6. ——— Withdrawal after issue joined.—*Civil Procedure Code, 1859, s. 97.*—*Failure to support claim.*—A plaintiff cannot be permitted to withdraw with liberty to bring a fresh suit after issue has been joined and he has failed to

WITHDRAWAL OF SUIT.—Withdrawal after issue joined—*continued.*

produce evidence to support his claim. MUDDUN RAM DOSS *v.* ISRAIL ALI CHOWDHRY [21 W. R., 291

7. ——— *Discretion of Court.—Power to interfere with discretion on appeal.*—Where, after issue joined, the plaintiff was permitted to withdraw his suit, with liberty to sue again,—*Held* that to allow withdrawal and fresh suit at that stage was a discretion to be exercised with great caution, but the discretion having been exercised it could not be interfered with on appeal by the Judge. OMESH CHUNDER MUNDUL *v.* THAKOOR DOSS MOOKERJEE . . 23 W. R., 345

8. ——— Withdrawal before final judgment.—*Discretion of Court.—Power to interfere with discretion on appeal.—Civil Procedure Code, 1859, s. 97.*—A lower Appellate Court had no power to interfere with the discretion of a first Court under section 97, Act VIII of 1859, in allowing a plaintiff, whether before or after the settlement of issues and before or after the acceptance of evidence upon the issues, at any time before final judgment, to withdraw from the suit with liberty to bring a fresh suit in the same matter. RAM KANYE DUTT *v.* HAROO CHUNDER MOJOOMDAR . . 17 W. R., 229

9. ——— Section 97 of Act VIII of 1859, applied only to cases where a plaintiff, before final judgment, is permitted by the Court to withdraw from his suit, with liberty to sue again. ANUND MOHUN PAUL CHOWDHRY *v.* RAM KISHEN PAUL CHOWDHRY. GOBIND CHUNDER PAUL CHOWDHRY *v.* RAMKISHEN PAUL CHOWDHRY [2 W. R., 297

10. ——— Leave to bring fresh suit.—*Civil Procedure Code, 1859, s. 97.*—Permission under section 97 to bring a fresh suit could not be given after final judgment has been pronounced. SHEORAJ NUNDUN SINGH *v.* RAJCOOMAR BABOO DEO NUNDUN SINGH . . . . 24 W. R., 23

11. ——— *Failure to prove case.—Dismissal of suit.—Procedure.*—The power to dismiss a suit, with liberty to bring a fresh one for the same matter, is limited to cases where the suit fails by reason of some point of form: such liberty should not be given where, after issue joined, the plaintiff has failed to make out his case. WATSON *v.* COLLECTOR OF RAJSHAYE [3 B. L. R., P. C., 48: 12 W. R., P. C., 43 13 Moore's I. A., 160

See MONA BIBEE *v.* OOMED ALI [16 W. R., 276

12. ——— *Civil Procedure Code, 1859, s. 373.—Ground for allowing withdrawal.—Quære,*—Whether, under section 373 of Act X of 1877, the Court ought to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the ground that the defence to the suit was such that the suit must fail if proceeded with. ZAHUR-UN-NISSA *v.* KHUDA YAR KHAN [I. L. R., 3 All., 528

WITHDRAWAL OF SUIT—*continued.*

13. ——— Ground for allowing withdrawal.—*Civil Procedure Code, 1859, s. 97.—Inability to prove claim.*—Where a plaintiff asked for permission to withdraw his plaint saying that it would be out of his power to adduce the evidence, which he pointed out as existing in certain records, within the period fixed by the Court for hearing the case, the Court was competent, under section 97, Act VIII of 1859, to grant him permission to withdraw the suit, POREESH NARAIN ROY *v.* SURUT SOONDUREE DEBEE . . . . . 16 W. R., 100

14. ——— *Insufficiency of evidence.*—In a suit by one of several sharers of certain mortgaged property for contribution on account of payments made by the plaintiff to prevent foreclosure, the Court on appeal thought the plaintiff might have produced better evidence, but his claim being a good one, it allowed him to withdraw the suit with leave to bring a fresh one. KHATOON KOONWAR *v.* HURDOOT NARAIN SINGH [20 W. R., 163

15. ——— Compromise of suit on appeal.—*Civil Procedure Code, 1859, s. 97.—Subsequent suit on compromise.*—A suit founded on a compromise, which was entered into when special appeal was withdrawn, was not barred by section 97, Act VIII of 1859, as it was not a suit for the same matter within the meaning of that section; but if the compromise was duly made by the parties thereto, and if its terms have been broken, a party to it is entitled to maintain a suit to enforce it. GOLAB SINGH *v.* CHEDA SINGH . . . . 3 Agra, 135

16. ——— Private agreement.—*Restoration of suit.*—Where a plaintiff filed a petition withdrawing his claim unconditionally, the suit should be at once struck off the file. If the defendant had entered into some private agreement and did not fulfil the same, it might give a new right of action to the plaintiff for enforcing that agreement, but was no reason for setting aside the petition for withdrawal of the suit as null and void. SHUMSHER BAHADOOR *v.* MAHOMED ALI BEG . 2 Agra, 158

17. ——— Suit for possession.—*Subsequent suit for rent.—Civil Procedure Code, 1859, s. 97.*—There was nothing in section 97, Act VIII of 1859, to prevent a suitor from instituting a claim for possession, and afterwards bringing one for rent. RAMKISHORE MUNDLE *v.* MOORAD MUNDLE [W. R., 1864, Act X, 67

18. ——— Suit for possession after release from attachment in execution in another suit.—*Civil Procedure Code, 1877, s. 97.*—A claim to attached property made under Act VIII of 1859, section 246, was dismissed, and the claimant, in the year 1875, instituted a regular suit against the decree-holder under the provisions of that section. The decree-holder then released the property from attachment, and the plaintiff withdrew his suit. The same property was afterwards, in the year 1878, attached again and sold in execution of the same decree. *Held* that a subsequent suit for possession

WITHDRAWAL OF SUIT.—Suit for possession after release from attachment in execution in another suit—*continued.*

of the property against the purchaser at the execution sale was not barred under section 97 of Act VIII of 1859. *Eshen Chunder Singh* v. *Shama Churn Bhutto, 11 Moore's I. A., 7*, cited. MUKHODA SOONDURY DASI *v.* RAM CHURN KARMOKAR [I. L. R., 8 Calc., 871

19. ——— **Suit withdrawn under Regulation law.**—*Civil Procedure Code, 1859, s. 97.*—A plaintiff without leave of the Court withdrew from a suit in 1853. He filed a fresh suit in the same cause of action in 1866. *Held* that he was not debarred from doing so, as the provisions of section 97 of the Code of Civil Procedure did not apply VINAYAK JOSHI *v.* JANARDAN JOSHI [7 Bom., A. C., 23

20. ——— **Nature of fresh suit.**—*Fresh suit filed upon a different title in existence at date of former suit.—Civil Procedure Code (XIV of 1882), s. 373.—Practice.*—The plaintiffs, who were an English joint stock company registered under the English Companies Act of 1862, sued the defendant as a past member of the bank, upon a balance order of the High Court of Justice in England, dated 24th February 1881, to recover the sum of £678-3. In August 1882, the plaintiffs had filed a previous suit against the defendant to recover the said sum of £678-3. That suit was based upon a call order, dated 11th November 1880, which it sought to enforce. By an order made in that suit on 7th April 1883, the plaintiffs were permitted to withdraw it, with liberty to bring a fresh suit for the same cause of action. The present suit to enforce a balance order, dated the 24th February 1881, was filed on 11th February 1885. It was contended on behalf of the defendant that the present suit being based upon an order which was in existence at the date of the previous suit, the plaintiffs could not now sue upon it; that the plaintiffs could not abandon the title upon which they claimed in the first suit, and set up a different title in the second. *Held* that the plaintiffs were not precluded from bringing the second suit upon the balance order, and that the suit was properly framed. LONDON, BOMBAY, AND MEDITERRANEAN BANK, *v.* BURJORJI SORABJI LYWALLA . . . I. L. R., 9 Bom., 346

21. ——— **Withdrawal of suit by next friend.**—*Suit on behalf of a minor.—Civil Procedure Code (Act VIII of 1859), s. 97.—Fraud.*—Where a Court has reason to believe that a suit is lawfully brought by a party who has a right to bring it on behalf of a minor, any withdrawal of the suit by that party would have precisely the same effect as the withdrawal of a suit by a person of full age. But where a person acting for a minor has fraudulently withdrawn the minor's suit under section 97 of Act VIII of 1859, without obtaining leave to bring a fresh suit, and by such withdrawal an absolute statutory prohibition is imposed on the minor from bringing a fresh suit, it is open to the minor to relieve himself from the consequences of the fraud in one of three ways,—*viz.*, (1) by an application to the Court in the suit in which the withdrawal took place; (2) by a regular suit to set aside the judgment founded upon the withdrawal; or (3) by bringing a fresh suit for the same purpose, and setting up the fraud as an answer to the statutory bar. ESHAN CHUNDRA SAFOOI *v.* NUNDAMONI DASSEE . . . I. L. R., 10 Calc., 357

WITHDRAWAL OF SUIT.—Withdrawal of suit by next friend—*continued.*

22. ——— **Withdrawal wrongly allowed.**—*Arbitration.—High Court's powers of revision.—Civil Procedure Code, ss. 2, 373, 588, 622.—Practice.—Notice to show cause.—Amendment of plaint.*—An order under section 376 of the Civil Procedure Code permitting the withdrawal of a suit, with liberty to bring a fresh one, not being made appealable by section 588, or being a "decree" within the meaning of section 2, is not appealable. When the plaintiff in a suit applies for permission to withdraw it, with liberty to bring a fresh one, such permission should not be granted without the defendant being served with notice to show cause why such permission should not be granted. *L.*, claiming as heir to *H.*, a deceased Hindu, sued *K.*, his widow, and *G.*, a minor represented by his mother and guardian *B.*, to have the adoption by *K.* of *G.* set aside and for certain other reliefs. The matters in difference in the suit were referred to arbitration, and an award was made in favour of the defendants. The plaintiff preferred objections to the award. Before these were disposed of *K.* died. The Court of first instance subsequently allowed the objections and set aside the award. The minor defendant then applied to the High Court for revision of the order setting aside the award. This application was rejected, on the ground that the order might be impugned on appeal from the decree in the suit. The plaintiff subsequently applied for permission to withdraw the suit, with liberty to bring a fresh one, on the ground that, *K.* having died, he was entitled to possession of the immoveable property left by *H.* This permission was granted. The minor defendant applied to the High Court for revision. *Held* that it might have been a very good ground for allowing the plaintiff to withdraw the suit that *K.*, the adoptive mother of the minor defendant, had died *pendente lite*, had no arbitration proceedings taken place in the course of the suit; but when the parties had referred their differences to arbitration, and an award had been made in favour of the defendant, and had been set aside, and an application for revision of the order setting it aside had been refused, on the ground that the matter could be made the subject of appeal from the final decree in the suit, permission to withdraw the suit and bring a fresh one should not have been granted. The minor defendant might be seriously prejudiced by such a course, and the suit had not abated against him by the death of *K.*, while on the other hand a decree in the suit, if in his favour, would decide the litigation, and if in favour of the plaintiff, would not prevent his bringing a suit for possession on the separate cause of action which had arisen. *Stahlschmidt* v. *Walford, L. R., 4 Q. B. D., 217*, referred to. The High Court refused to allow the plaint in the suit to be amended, by the addition

WITHDRAWAL OF SUIT.—Withdrawal wrongly allowed—*continued.*

of a claim for possession of the property left by *H.* KALIAN SING *v.* LEKHRAJ SINGH
[I. L. R., 6 All., 211

23. ——— **Costs.**—*Power to award costs.—Withdrawal without leave.*—The High Court has no power, under the Civil Procedure Code, to award costs to the defendant when the plaintiff withdraws not having asked leave to do so with liberty to bring another suit for the same matter. BRASS *v.* TIRUVENGADA PILLAI . . . . **1 Mad., 247**

24. ——— *Power to award costs.—Civil Procedure Code, 1859, s. 97.*—Where the plaintiff applied, under section 97, Act VIII of 1859, to be allowed to withdraw from the suit, with liberty to bring a fresh suit for the same matter, the Court refused the application. Another application for leave, simply to withdraw from the suit, was granted, the Court dismissing the suit with costs. *Brass* v. *Tiruvengada Pallai 1 Mad., 247*, dissented from. HOSSAINI BIBI *v.* PERI KHANUM
[1 B. L. R., O. C., 45

25. ——— *Form of order.—Civil Procedure Code, 1859, s. 97.*—A plaintiff who is permitted to withdraw from his suit under section 97, Act VIII of 1859, must pay the defendant's costs. On such withdrawal, the proper order to be recorded is not one of dismissal, but one simply permitting the plaintiff to withdraw the suit, with liberty to bring a fresh suit for the same matter on payment of costs or otherwise as the Court may direct. DOUCETT *v.* WISE . . **1 W. R., 322**

26. ——— *Payment of costs not made condition precedent to fresh suit.—Power to stay suit.—A.*, having brought an action against *B.*, was allowed to withdraw, with leave to bring a fresh suit, and was also ordered to pay the costs. *Held*, that the payment of the costs not having in terms been made a condition precedent to bringing a fresh suit, the Court had no power to stay proceedings in the fresh suit, on the ground that the costs had not been paid. CHITTO *v.* MUZZUR HOSSAIN
[2 Hyde, 212

27. ——— *Small Cause Court.*—A Small Cause Court is not bound to allow a plaintiff to withdraw a suit, on the ground that he has received payment from one of the defendants in the suit, that attempt to withdraw having been made after the plaintiff had succeeded in getting a judgment against two defendants which had been set aside by the Court on various grounds, and a new trial ordered. In such a case the Court may permit the withdrawal of the suit upon the terms of plaintiff paying the first defendant's costs. RAMA CHANDRA SHASTRY *v.* PAPU AIYAN . **3 Mad., 27**

28. ——— **Withdrawal of appeal.**—*Power of Appellate Court.*—An Appellate Court has authority to permit an appeal to be withdrawn. RAM PERSHAD OJHA *v.* BHUROSA KOONWAR
[9 W. R., 328

WITHDRAWAL OF SUIT.—Withdrawal of appeal—*continued.*

29. ——— *Permission of Court.—Notice of withdrawal.*—An appellant has no right to withdraw an appeal, which has been regularly registered, without the permission of the Court. Where the appellant had given notice of the withdrawal of the appeal before the day of the hearing, and notice of withdrawal had been given to the respondent, but not until costs had been incurred,—*Held* that the appellant was not at liberty to withdraw the appeal, and the Court ordered that the appeal be set down for hearing. KAREEM BEE *v.* BEEGAM BEE . . . . **3 Mad., 368**

30. ——— **Withdrawal of suit on appeal.**—*Act XXIII of 1861, s. 37.—Power of Appellate Court.*—Under section 37, Act XXIII of 1861, the High Court, upon appeal from a Judge sitting in the exercise of the ordinary original jurisdiction of the Court, had power, before pronouncing final judgment in appeal, to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit. GREGORY *v.* DOOLEY CHAND
[14 W. R., O. C., 17

31. ——— *Civil Procedure Code, 1859, s. 97.—Exercise by Appellate Court of powers under s. 37, Act XXIII of 1861.*—Where application was made for leave to withdraw a suit, with leave to bring a fresh one, it being contended that the fact of a notarial protest on inland bills, and of their being in the hands of the holder without signature, was proof of dishonour; and further, that defendant being a Hindu, there was no necessity for notice of dishonour,—the Appellate Court, reversing the decision of the Court below, granted the application under the power given by section 37, Act XXIII of 1861. BOMBAY CITY BANK *v.* MOONJEE HURRYDOSS . . . . **Bourke, A. O. C., 99**

32. ——— *Civil Procedure Code, 1859, s. 97.*—The plaintiff having sued, and the issues having been laid down as though the suit was for separate possession, the decree of the lower Court for joint possession was set aside, with leave to plaintiff, under Act VIII of 1859, section 97, to bring a fresh suit for joint possession. JUGGUNNATH DEB NAZIR *v.* MOHEBOOLLAH
[17 W. R., 164

33. ——— *Appellate Court, Powers of.—Discretion, Exercise of.—Civil Procedure Code, 1882, ss. 373, 582.*—Where, on appeal from a decree dismissing a suit, the Appellate Court, being of opinion that the plaint was informally drawn and its allegations regarding the cause of action not sufficiently specific, gave the plaintiff permission, under section 373 of the Civil Procedure Code, to withdraw the suit, with leave to institute a fresh one,—*Held, per* STRAIGHT, *J.*, that with reference to the terms of section 582 of the Civil Procedure Code, the Appellate Court had power to avail itself of the provisions of section 373, and therefore had a discretion to make the order allowing the plaintiff to withdraw the suit and institute a fresh one. *Gregory* v. *Dooley Chand, 14 W. R., O. C., 17;* and *Khatoon Koonwar* v.

WITHDRAWAL OF SUIT.—Withdrawal of suit on appeal—*continued.*

Hurdoot Narain Singh, 20 W. R., 163, referred to. Also *per* STRAIGHT, *J.*, that it could not be said that the Appellate Court in this case had exercised its discretion so unreasonably or erroneously as to compel the interference of the High Court with it in appeal. *Per* TYRRELL, *J.*, that it might be taken that the Appellate Court, though not so stating in express terms, meant to set aside, and did set aside, the decree of the Court of first instance, regarding it as a decree which could not have been rightly made and must be set aside, by reason of the radical defect in the plaint, the basis of the suit and the decree; and that, in this view, there was no legal objection to the exercise by the Appellate Court of the discretionary power of Chapter XXII of the Code. GANGA RAM *v.* DATA RAM . . I. L. R., 8 All., 82

34. ——— Applications for execution of decree.—*Civil Procedure Code, s. 374.—Withdrawal of application.*—The rule laid down in section 374 of the Civil Procedure Code (Act XIV of 1882)—that where a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought—does not apply to applications for execution. *Pirjade* v. *Pirjade, I. L. R., 6 Bom., 681*, dissented from. TARACHAND MEGHJI *v.* KASHINATH TRIMBAK [I. L. R., 10 Bom., 62

35. ——— Revocation of withdrawal.—*Civil Procedure Code, 1859, s. 97.*—A plaintiff who has withdrawn from his suit is at liberty to rescind the act of withdrawal at any time before final judgment. Section 97 of the Civil Procedure Code was held to be inapplicable to a case where the plaintiff rescinded after two days, a petition he had presented of withdrawal from his claim. The last clause of that section contemplated cases in which the withdrawal is not revoked. RAMBHUROS LALL *v.* GOPEE BEEBEE . . 6 N. W., 66

WITNESS—CIVIL CASES.

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[3 B. L. R., Ap., 6

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[B. L. R., Sup. Vol., 716

1. PERSON COMPETENT TO BE WITNESS.

1. ——— Arbitrator.—*Suit after award is set aside.*—If an arbitration award is set aside and the matter is tried as a suit before the Court, the arbitrator cannot be examined as a witness as to the grounds of his decision, but only to prove any admission which may have been made before him in the course of the arbitration and which might be material evidence. NILMONEE BOSE *v.* MOHIMA CHUNDER DUTT . . . 17 W. R., 516

2. ——— Attorney.—*Advocate.—Competent witness.*—An attorney who has acted as advocate for one of the parties, and pleaded his case in Court, can be examined as a witness in the case. RAMPAL SHAW *v.* BISWANATH MANDAL
[5 B. L. R., Ap., 28

3. ——— Magistrate.—*Suit for malicious prosecution.—Magistrate who held preliminary enquiry into criminal charge.*—Magistrates are not incapacitated to give evidence of matters which have come before them in the course of a preliminary enquiry into a criminal charge. *Held* that in a suit for a malicious prosecution the defendant had a right to the evidence of the Subordinate Magistrate, who held a preliminary enquiry into a charge of forgery preferred by the defendant against the plaintiff. RAMASAMI AYYAN *v.* RAMU MUPAN . 3 Mad., 372

4. ——— Munsif.—*Witness as to facts judicially before him.*—A Munsif ought not to be called on to depose as to what took place before him in the course of a trial which he was conducting as Munsif, and he is entitled to exemption. ANONYMOUS . . . . . 6 Mad., Ap., 42

WITNESS—CIVIL CASES—*continued.*

2. SUMMONING WITNESSES.

5. ——— **Duty of Court.**—*Securing attendance of witnesses.*—Every Court is bound to render all reasonable assistance to a party to enforce the attendance of his witnesses. NILMONEE BANERJEE *v.* SHURBO MONGOLA DEBEE . . **6 W. R., 14**

6. ——— *Application for summons to cite witnesses.*—A party is entitled at any stage of the case before hearing to apply for a summons to cite witnesses without reference to the number of such applications which he may have previously made, and it is the duty of the Court to comply with such application, if any time be left before the hearing of the cause. ANURUP CHANDRA MUKHOPADHYA *v.* HIRAMANI DASI . **3 B. L. R., Ap., 38**

S. C. ONOOROOP CHUNDER MOOKERJEE *v.* HEERA MONEE DOSSEE . . . **11 W. R., 418**

HARI DAS BAISAKH *v.* MOAZAM HOSSEIN **[8 B. L. R., Ap., 16 : 15 W. R., 447**

7. ——— **Power to summon witnesses.**—*Settlement of issues.*—Act VIII of 1859 conferred no authority upon a Judge to issue summonses to witnesses to attend on the settlement of issues. The written statements must be prepared with great care and deliberation, so as to dispense altogether with parol evidence at the settlement of issues. ANUND CHUNDER BANERJEE *v.* WOOMESH CHUNDER ROY **[1 Ind. Jur., O. S., 15 : 1 Hyde, 147**

The subsequent Codes, however, expressly provide for the attendance of witnesses at a settlement of issues: see section 159, Civil Procedure Code, 1882.

8. ——— **Discretion of Court to summon witnesses.**—A Judge's discretion in not compelling the attendance of witnesses named by one of the parties, must be exercised on reasonable grounds distinctly stated in the judgment. OZEER MAHOMED *v.* BYDNATH DOSS CHOWDHRY . **[5 W. R., Act X, 6**

HARA CHAND POBAMANICK *v.* KRISHTO MONEE GIREE . . . . **1 W. R., 298**

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See NEEM CHUND DEY *v.* ANUND COOMAR ROY CHOWDHRY . . . **7 W. R., 147**

9. ——— *Selection of witnesses by Court.*—It is not right for the lower Court to select five out of twenty witnesses tendered for examination. It is the bounden duty of the Judge to receive all the evidence tendered, unless the object of summoning a large number of witnesses clearly appears to be to impede the adjudication of the case, or otherwise to obstruct the ends of justice. RAMDHAN MANDAL *v.* RAJBALLAB PARAMANIK **[6 B. L. R., Ap., 10**

10. ——— *Power to refuse to summon witness.*—A Court has no power to refuse to summon witnesses when expressly requested by a party to do so unless the witnesses are required to be summoned in such a manner, or in such numbers, as

WITNESS—CIVIL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

Discretion of Court to summon witnesses—*continued.*

clearly indicates a vexatious desire of obstructing the course of justice. RAM PHUL PANDEY *v.* WAHED ALI KHAN . . . . . **14 W. R., 66**

11. ——— *Refusal to summon witnesses.*—*Reasons for refusing application to enforce attendance.*—It is not incumbent on a Court to give detailed legal reasons for its refusal to comply with an application to enforce the attendance of a party to a suit as a witness. SIDDHESSUREE DEBIA *v.* DENOBUNDHOO KOONDOO . **6 W. R., 65**

12. ——— **Preliminaries to summoning witness.**—*Materiality of evidence.*—Before the Court makes an order compelling the attendance of a party to the suit, it must be satisfied that his evidence will be material. GOPAL CHUNDER HAZRAH *v.* MOHESH CHUNDER BANERJEE . **21 W. R., 44**

13. ——— **Summoning plaintiff as witness.**—*Reasons for summons.*—*Duty of Court.*—*Materiality of evidence.*—A Court is bound, before summoning a plaintiff to give evidence, to record the reasons of its being satisfied that the evidence of the plaintiff is essential to the defendant's case. Where, however, the Court does not give reasons for being satisfied that the presence of the plaintiff is necessary, it does not follow that the defendants had failed to satisfy the Court that there was sufficient ground for the application. MAKOOND ADIT *v.* SUTTOORGHUN ADIT . **[17 W. R., 507**

14. ——— **Application to summon witnesses.**—*Witnesses declared unnecessary by Court.*—Where on a case coming on for hearing before a Court to which it had been remanded, the Judge observed that the evidence of witnesses would be unnecessary, the declaration was held to have sufficiently justified the plaintiffs in making no further application for a summons on their witnesses. RAM JEWUN SINGH *v.* RADHA PERSHAD SINGH . **[16 W. R., 109**

15. ——— *Undertaking to bring witnesses.*—*Practice.*—On the 12th October 1879 the plaintiff applied to the Court for subpœnas to his witnesses. The Court refused to grant them, on the ground that the plaintiff had himself originally undertaken to bring his witnesses. (The Court had fixed the 28th October 1879 for the final hearing of the plaintiff's case.) *Held* that the plaintiff's failure to bring his witnesses was no sufficient reason for depriving him (the plaintiff) of his right to have subpœnas issued, if he found himself unable to bring his witnesses or to detain them till they could be examined, although it might possibly be, under certain circumstances, a reason for not waiting for them, if the plaintiff's case had been in other respects finished before they could be examined. PANDURANG ANPAI *v.* KESHAVJI JADHAVJI . . . . **I. L. R., 6 Bom., 742**

WITNESS—CIVIL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

16. ——— Time for summoning witnesses.—*Duty of Court.*—The Civil Procedure Code neither expressly nor impliedly declares that witnesses must be summoned before the day fixed for the first hearing of the suit. So long as the hearing merely stands adjourned, and so long as the party who wishes to summon witnesses has not closed his case, the Court is bound to summon them, unless it appears that the application is made so late that the witnesses cannot be reasonably expected to attend in time to be examined before that party's case closes. INDRO CHUNDER BABOO *v.* DUNLOP
[9 W. R., 530

17. ——— Ground for refusal to summon witnesses.—*Obligation of Court to assist party.—Delay in giving names of intended witnesses.* —Where an appellant delayed to give in the names of his witnesses, but would yet have been within reasonable time to secure their attendance on the day of hearing if summonses had been sent through different peons by the railway,—*Held* that the lower Appellate Court was bound to have directed the issue of the summonses, and to have given every assistance to the party asking for them, all additional expenses being paid by such party. PEAREE MOHUN MOOKERJEE *v.* MADHUB CHUNDER GHOSAL
[9 W. R., 489

18. ——— *Omission of proper steps to obtain attendance of witnesses.*— Where some of the witnesses (defendants) in a suit had been examined, and plaintiff petitioned the Court to have the remaining defendants examined as witnesses, he was held not to have taken the necessary steps required by law to enforce their attendance, because he did not make any special application to the Court, or show sufficient grounds in support of his petition. RAM TUHUL THAKOOR *v.* OODIT NARAIN SINGH . . . . . 12 W. R., 36

19. ——— *Procedure under Dekkan Agriculturists Act, XVII of 1879, s. 7.— Right of defendant to call witnesses.*—The plaintiff sued, under section 3, clause (*w*) of Act XVII of 1879, for money due on a bond dated the 8th September 1877. The defendant, though duly summoned, did not appear on the day fixed in the summons, which was for the final disposal of the suit. The Court, therefore, proceeded with it *ex parte*. The defendant, being subsequently summoned and examined as a witness under section 7 of the Act, admitted the bond sued upon, but pleaded part-payment of the plaintiff's claim. He then applied to the Court that his witnesses should be summoned, and that their evidence be taken in support of his allegation. The Subordinate Judge was of opinion that he (defendant) was not entitled to offer the evidence. On his referring the case to the High Court,—*Held* that it was his duty to summon the witnesses named by the defendant. DULICHAND *v.* DHONDI
[I. L. R., 5 Bom., 184

20. ——— *Civil Procedure Code, 1877, s. 137.—Summons to produce documents.*

WITNESS—CIVIL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

Ground for refusal to summon witnesses —*continued.*

—In all cases in which parties apply for a summons to compel the attendance of witnesses, or a summons to produce documents, or apply to have a document sent for under section 137 of the Code of Civil Procedure, the Court ought not to refuse such application merely because in its opinion the witnesses cannot be present, or the documents cannot be produced, before the termination of the trial. KRISHNA CHURN BAISACK *v.* PROTAB CHUNDER SURMA
[I. L. R., 7 Calc., 560

21. ——— Ground for adjournment of suit.—*Delay in making application to summon witnesses.—Discretion of Court.*—If a party applies for summons to witnesses so late that he cannot bring the witnesses on the day of hearing, it still remains in the discretion of the Court to decide whether or no the case should be adjourned. A Munsif is bound under the Procedure Code to issue summonses to witnesses when asked for. ABDOOL KADIR *v.* ABIN MIRDHA . . . . . 24 W. R., 290

22. ——— *Civil Procedure Code, 1882, ss. 159 and 167.—Summoning witnesses. —Delay in serving summonses.*—Under section 159 of the Code of Civil Procedure (Act XIV of 1882), parties are entitled to summonses for their witnesses at any time before the final hearing, but if there has been delay and want of diligence in consequence of which witnesses, not having been served in good time, are not present, the Court may properly refuse to adjourn the hearing. KAJI AHMED *p.* KAJI MAHAMAD
[I. L. R., 9 Bom., 308

23. ——— Power to dismiss suit.—*Dismissal of suit on ground of there not being time after filing of list to summon witnesses.—Civil Procedure Code, 1859, s. 149; 1877, s. 159.*—The 20th of March 1877 having been fixed for the final hearing of a suit, the plaintiff, on the 17th of March, and the defendant on the 19th, filed their lists of witnesses to be summoned. Both lists were ordered merely to be put up with the record. When the suit came on for hearing, it was dismissed on the ground that, when the plaintiff filed his list there was not sufficient time left to summon the witnesses. *Held* that the Judge was not justified in dismissing the suit on this ground, unless he found that it would have been absolutely impossible to secure the attendance of the witnesses had the summonses been granted on the 17th instant. Section 149 of Act VIII of 1859, and section 159 of Act X of 1877, discussed. RAJENDRO NARAIN NEOGI *v.* KUMUD NARAIN BHUP
[3 C. L. R., 569

24. ——— Issue of fresh subpœnas to witnesses.—*Re-hearing of ex parte case under s. 119, Civil Procedure Code, 1859.—Quære.*—Where, either under section 119, Code of Civil Procedure, or in the exercise of a power of review, a suit is restored to its original position, is the plaintiff bound to obtain and issue fresh subpœnas? BISHEN PERKASH SINGH *v.* RUTTUN GEER CHELA . . 20 W. R., 3

WITNESS—CIVIL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

25. ——— **Service of subpœnas.**—*Liability for non-service.*—After a list of witnesses has been filed and the tullubana paid, the Court's officers, not the applicant, are responsible for the service and return of notice. MUSSITER KHANUM *v.* HOOKOOM BIBEE . . . **15 W. R., 88**

26. ——— **Form of summons.**—*Omission to state place of attendance.*—A summons should state the place of attendance. ANONYMOUS **[7 Mad., Ap., 14**

ANONYMOUS . . . **7 Mad., Ap., 43**

See Section 163, Civil Procedure Code, 1882.

27. ——— **Summoning public officer as a witness.**—In fixing the time for the attendance of a public officer as a witness, or in granting an adjournment for that purpose the fullest consideration must be given to the exigencies of the public duties of the officer summoned. ANONYMOUS **[6 Mad., Ap., 6**

28. ——— **Issue of warrant on non-attendance of witness.**—*Warrant of arrest for witnesses not attending.—Verbal order to attend.*—A verbal order of the Court to witnesses requiring them to attend on a future day would not justify the issuing of a warrant for the apprehension of such witnesses in case they failed to attend in obedience to such verbal order. VENKATAPPAH *v.* PAPAMMAH . . . . . **5 Mad., 132**

ANONYMOUS CASE . . **6 Mad., Ap., 10**

See, however, ANONYMOUS CASE **[5 Mad., Ap., 15**

3. EXPENSES OF WITNESSES.

29. ——— **Right to be paid expenses.**—*Omission to apply for expenses before giving evidence.*—A witness is entitled to be paid his expenses by the party at whose instance he has been summoned, although he has not applied for them before giving his evidence. LONDON, BOMBAY, AND MEDITERRANEAN BANK, *v.* MAHOMED IBRAHIM PARKAR . . . . . **I. L. R., 4 Bom., 619**

30. ——— *Suitable expenses.*—*Persons of rank and wealth.*—People of rank and wealth when summoned as witnesses to a distance from their place of residence, are entitled to travelling and other expenses suitable to their circumstances. CHUNDER SEKHUR DEB *v.* JADUB CHUNDER SETT . . . . . **19 W. R., 78**

31. ——— **Payment of expenses into Court.**—*Civil Procedure Code, 1859, s. 151.*—Under section 151, Act VIII of 1859 (extended to Revenue Courts by section 67, Act X of 1859), the defendant was not bound to pay into Court the costs of summoning and defraying the expenses of the witnesses, until the Court had fixed what was reasonable. MOHUN MUNDUR *v.* BRIJ BHOOKUN SINGH **[9 W. R., 128**

WITNESS—CIVIL CASES—*continued.*

3. EXPENSES OF WITNESSES—*continued.*

32. ——— **Power to order evidence to be taken.**—*Omission to tender expenses.—Evidence of tender of expenses.*—Where there was no proof that a defaulting witness's expenses were tendered to him by the party at whose instance he was summoned, the Court on appeal declined to order that witness's evidence to be taken or to take it itself. ISHEN CHUNDER SEN *v.* ONATH NATH DEB. COWELL *v.* ISHEN CHUNDER SEN . **18 W. R., 16**

33. ——— **Amount of expenses.**—*Compensation for loss of time.*—Act VIII of 1859 made no provision for compensation to witnesses for loss of time. NAWAB NAZIM OF BENGAL *v.* PROSONO NARAIN DEB . . . . . **2 Hyde, 236**

34. ——— **Provision for expenses.**—*Suit for expenses.—Cause of action.*—No action for the expenses of a witness will lie. Explanation of the manner of providing for the payment of such expenses. DE SARAN *v.* HURRISH CHUNDER BISWAS **[5 W. R., S. C. C. Ref., 6**

4. ABSCONDING WITNESSES.

35. ——— **Non-attendance of witnesses on summons.**—*Duty of parties.—Commission.*—When witnesses do not appear after service of summons, it is the duty of the party requiring their evidence, and not of the Court, to move for further measures to be taken to secure their attendance; and when a Commission is issued for the examination of witnesses, the Court must be moved to wait for the return. NUND MOHUN CHOWDHRY *v.* GOLUCK NATH NEOGEE . . . . . **11 W. R., 99**

36. ——— *Duty of parties.*—*Issue of attachment.—Civil Procedure Code, 1859, s. 168.*—Where witnesses do not appear on summons, it is for the parties to move the Court, not for the Court to proceed, *suo motu*, to further the production of the witnesses, though the Court may issue attachment under section 168, Code of Civil Procedure, if it is shown that the witnesses are absconding or keeping out of the way. BACHMAN *v.* LALL BEHAREE PANDEY . . . . **13 W. R., 324**

37. ——— **Order for arrest of witness.**—*Civil Procedure Code, 1859, s. 168.—Proceedings against witnesses absent who have been summoned.*—Where a lower Appellate Court, by the terms of its order on a petition for the apprehension of witnesses, under section 168, Code of Civil Procedure, undertook to see that proper orders should be passed, it was bound to pass such orders as might, in its judicial discretion, be necessary under that section. MOHADEB SHAHA *v.* SHEO SUHOY GEER . **9 W. R., 359**

38. ——— *Witness making default in appearing.—Civil Procedure Code, 1859, s. 168.—Ground for issue of warrant.*—Section 168 of the Civil Procedure Code required that there should appear to the Court to be satisfactory ground for believing that the default on the part of witnesses summoned to give evidence was without lawful excuse

WITNESS—CIVIL CASES—*continued.*

4. ABSCONDING WITNESSES—*continued.*

Order for arrest of witness—*continued.*

before issuing a warrant for the arrest of such witnesses. But it was not necessary for this purpose to institute a formal investigation and come to a determination on the evidence adduced. PERIYANNA CHETTY *v.* GOVINDA GOUNDEN . **5 Mad., 104**

39. ——— Issue of proclamation against absent witness.—*Materiality of evidence.—Ground for non-attendance.*—A Court was held to be not bound to issue a proclamation against absent witnesses in a case where it was not satisfied that the witnesses were material, or that they had really absconded to avoid attendance. BHOOBUN MOYEE DOSSEE *v.* KISHOREE DOSSEE **6 W. R., 235**

40. ——— Application for process against absconding witness.—*Ground for not granting application.—Civil Procedure Code, 1859, ss. 159, 168.*—On application being made under sections 159 and 168 of Act VIII of 1859 for issue of process against an absconding witness, the Court if satisfied (as it was bound to be) that the witness had absconded, and that he was a material witness ought to grant the application unless the applicant had placed himself in such a position by his conduct that it would be inequitable to grant it. RAJOO SINGH *v.* LALLA BALGOBIND LAL . . **1 W. R., 26**

41. ——— Notice of proclamation.—*Civil Procedure Code, 1859, ss. 159 and 168.—Service of proclamation.*—The proclamation issuable under section 159, Act VIII of 1859, could not be legally affixed to the mal cutcherry of a defaulting witness. Before the provisions of that section can come into play, personal service of summons must be attempted. In the absence of process of legal service, the Magistrate's order of imprisonment for contempt, under section 174 of the Penal Code, and section 168 of the Code of Criminal Procedure, was quashed. QUEEN *v.* HURYNATH CHOWDHRY

[7 W. R., Cr., 58

42. ——— Discretion of Court as to issue of proclamation.—*Proclamation against absent witness.—Civil Procedure Code, 1859, s. 159.*—Section 159, Code of Civil Procedure, gives a Civil Court a discretion as to the issue of proclamation and subsequent orders for attachment; but such Court is bound to exercise a reasonable discretion. PORAN CHUNDER GHOSE *v.* GOPEE NATH SINGH

[8 W. R., 505

43. ——— *Ground for issue of proclamation.—Civil Procedure Code, 1859, s. 159.*—A Court was not authorised to issue the proclamation and attachment mentioned in section 159, Code of Civil Procedure, unless it was proved to its satisfaction that the evidence of the witness was material, and that he was avoiding the summons; and after these circumstances have been shown, it was a matter of discretion to issue the proclamation and attachment, and after issue to let the case stand over. KALEE DASS CHUCKERBUTTY *v.* ESHAN CHUNDER CHATTERJEE . . . . **13 W. R., 416**

WITNESS—CIVIL CASES—*continued.*

4. ABSCONDING WITNESSES—*continued.*

44. ——— Ground for postponement of case.—*Application for process against absent witness made at late stage of case.—Civil Procedure Code, 1859, s. 159.*—Where an application was made at a very late stage of a case to enforce the provisions of section 159 of the Code of Civil Procedure, without proffer of any proof that the witness was absconding or keeping out of the way for the purpose of avoiding the service of the summons, the lower Appellate Court was held to have been justified in not postponing the case to secure the attendance of the witness, although material. AJOODHYA DOSS *v.* MISRUN . . . . . **15 W. R., 176**

45. ——— Fine for avoiding service of summons.—*Act XIX of 1853, s. 28.—Act X of 1861.*—Section 28 of Act XIX of 1853 having been repealed by Act X of 1861, a Judge had no jurisdiction, under Act VIII of 1859, to inflict a fine for the purpose of punishing a witness who absconded, or kept out of the way, to avoid service of summons. IN RE GAJADHAR PRASAD NARAYAN SINGH

[1 B. L. R., A. C., 186

S. C. GUJADHUR PERSHAD NARAIN SINGH *v.* JUGDEO NARAIN . . . **10 W. R., 233**

5. SWEARING OR AFFIRMATION OF WITNESSES.

46. ——— Objection to take oath.—*Member of Church of England.—Stat. 17 and 18 Vict., c. 125.*—A member of the Church of England is not exempt by law from taking an oath in a Court of Justice in India, although he may entertain sincere objections against taking an oath on the Bible, and is willing to make an affirmation binding upon his conscience. The English Statute 17 and 18 Victoria, Cap. 125, does not apply to India. VALU MUDALI *v.* SOWERBY . . . **2 Mad., 246**

47. ——— Where a Mahomedan witness stated that he had no objection to oaths in general, but that he was suffering from a disease which disqualified him from taking an oath on the Koran until purification,—*Held* that the witness must be sworn in the regular way or not at all. ANONYMOUS CASE . . . **1 Mad., 99, note**

6. EXAMINATION OF WITNESSES.

(*a*) GENERALLY.

48. ——— Selection of witness.—*Duty of parties.*—It is not the business of a Court to determine what witnesses shall be examined. The parties must select their own witnesses, and call upon the Court to examine such of them as they may offer for examination, and it is their own fault if they do not take the necessary steps to have the witnesses examined, or to compel them to be present for examination at the proper time. MORNO MOYEE DEBEE *v.* BHEEM KOOMAR CHOWDHRY . **6 W. R., 231**

DEEN DYAL SINGH *v.* DANEE ROY .

[13 W. R., 185

WITNESS—CIVIL CASES—*continued.*

6. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

49. ——— Right to have witnesses examined.—*Ground for refusing to hear witness.—Opinion of Court as to materiality of evidence.*—Every party to a suit is entitled to have all the witnesses whom he desires to call, and is ready at the trial to produce, heard by the Court, whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given. LOOLOO SINGH *v.* RAJENDUR LAHA [8 W. R., 364

PORAN CHUNDER GHOSE *v.* GOPEENATH SINGH [8 W. R., 505

CHOWDHRY KHOORGO ROY *v.* SHIB TOHUL ROY [17 W. R., 172

50. ——— *Ground of special appeal.—Omission of Court to examine witness.* —As a general rule, all the witnesses brought forward by a party ought to be examined. But when an objection is made in special appeal that the Judge below has omitted to examine certain witnesses, it ought to be shown that the evidence of those witnesses would have been material to the case. NILKANTH SURMAH *v.* SOOSELA DEBIA. . 6 W. R., 324

51. ——— Want of opportunity to adduce evidence, Proof of.—*Tender and rejection of witness.*—In order to establish such a plea as that he was not allowed an opportunity to adduce evidence a party must show that he tendered witnesses or other evidence, and that his tender was rejected on the ground alleged. BUKSH ALI SOWDAGUR *v.* JOYANUT KHAN . . . . . 11 W. R., 248

CHUNDER NATH SEIN *v.* ANUNDMOYEE DOSSEE [11 W. R., 289

QUEEN *v.* TOTARAM . . 11 W. R., Cr., 15

52. ——— Refusal to examine witness.—*Ground for refusal.—Omission from list of witnesses.*—The fact of a witness not having been named in the plaintiff's list of witnesses is no ground for refusing to examine him when produced at the proper time. RAKHAL DOSS MUNDUL *v.* PROTAP CHUNDER HAZRAH . . . 12 W. R., 455

53. ——— *Refusal of verbal request of vakil.—Ground of special appeal.* —Where a lower Appellate Court's refusal to examine witnesses in a suit for damages for assault is made a ground of special appeal, it is not sufficient to put in an affidavit to the effect that a verbal request of the vakil to examine the witnesses was refused by the Judge. RAMESSUR BHUTTACHARJEE *v.* SHIB NARAIN CHUCKERBUTTY . . 14 W. R., 419

54. ——— *Additional witnesses to facts already in evidence.—Tender of large number of witnesses.—Ground for remand.*—In a suit for possession of zemindari and other estates claimed by the plaintiff as son and heir of the deceased zemindar, the defendants denied the title of the plaintiff, alleging that he was a spurious and suppositititious child,

WITNESS—CIVIL CASES—*continued.*

6. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

Refusal to examine witness—*continued.*

and tendered fifty-eight witnesses to prove that fact. The Zillah Court having taken the depositions of thirty of these witnesses refused to permit the remaining twenty-eight to be examined, on the ground that as they were going to prove the facts deposed to by those already examined, it was unnecessary to take their depositions, and ultimately decided in favour of the plaintiff. The defendants appealed to the Sudder Court, which refused to examine the witnesses rejected by the Zillah Court, and affirmed the decree of that Court. On appeal to Her Majesty in Council, the Judicial Committee remitted the case back to the Sudder Court, being of opinion, that the refusal by that Court to permit the examination of the witnesses tendered was irregular, and that no decision could be come to upon the merits under such circumstances. JESWUNT SINGJEE UBBY SINGJEE *v.* JET SINGJEE UBBY SINGJEE [2 Moore's I. A., 424: 6 W. R., P. C., 46

55. ——— *Ground for remand.*—A lower Court having allowed some of the witnesses of the plaintiff to depart without taking their evidence, the plaintiff objected to its taking the evidence of more of the defendant's witnesses than of his own. Upon this the Court allowed some of the defendant's witnesses to leave the Court without examining them. The case on coming up to the High Court was remanded for examination of all the remaining witnesses and a fresh decision. GOPEE OJHA *v.* HUR GOBIND SINGH . 12 W. R., 229

56. ——— *Application to re-examine after consent to allow evidence in one suit to be evidence in others.*—Five suits having been brought to recover a balance of accounts from defendants, who were alleged to be partners of a trading concern, and as such liable, certain witnesses were examined in four of the cases in which the plaintiff in one of the suits was not a party, and at his request the evidence taken in those cases was allowed to be used as evidence in his case, and then the witnesses were discharged. Two days after this he applied to have the witnesses re-examined, giving no reason for his application, which was refused. *Held* that the refusal was justified in the absence of any new reason for the re-examination. SREENATH ROY *v.* GOLUCK CHUNDER SEIN . 15 W. R., 348

57. ——— Death before delivering legal judgment.—*Obligation to hear witnesses again.—Consent of parties.*—A suit was dismissed by a Deputy Collector, who died before recording a legal judgment, whereupon it was made over by the lower Appellate Court for trial to the deceased officer's successor, who decided the case in favour of the plaintiff upon the evidence as it stood on the record without any objection by either party. *Held* that it was not the duty of the second Deputy Collector to remand the witnesses or to take additional evidence, unless requested to do so by the parties. GOUR CHUNDER SEN *v.* MANICK RAM [13 W. R., 76

WITNESS—CIVIL CASES—*continued.*

6. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

58. ——— Recall of witness.—*Witness for plaintiff recalled for defendant.—Leave of Court.*—When a witness has been examined on behalf of the plaintiff he cannot be recalled as a witness for the defendant without leave obtained at the end of the first examination. MACKINTOSH *v.* NOBINMONEY DOSSEE . **2 Ind. Jur., N. S., 160**

59. ——— *Examination of witnesses by Appellate Court.*—Courts should in all cases exercise the powers with which they have been entrusted by the law in the examination of witnesses, if they see that they are not properly examined through the incompetency of those who have the management of the suits. If the Munsif fails to take proper evidence, the Appellate Court should not decide the case on such evidence as there is, but having the power to call for further evidence under section 355, Act VIII of 1859, it should take proper means for making the evidence complete. RAMGATI *v.* IMITARF BANEE . **1 B. L. R., S. N., 20 [10 W. R., 280**

60. ——— Mode of taking evidence.—Observations on the improper manner in which the evidence in cases is generally taken in the subordinate Courts, and in which it was taken in this case. PHUL KUAR *v.* SURJAN PANDEY **[I. L. R., 4 All., 249**

61. ——— Irregularity in examination of witness.—*Witness for plaintiff examined in absence of defendant or his pleaders.—Irregularity.—Objection not taken in time.—Evidence Act, s. 167.*—The examination of a material witness of the plaintiff, in the absence of the defendant, his vakil having been removed, and no other vakil then acting for him, is such an irregularity as, if objected to at the proper time, would be fatal to the reception of such evidence. But where no objection was urged during the trial, or until an appeal was interposed, the Judicial Committee held that the objection came too late and could not be sustained, as, notwithstanding such irregularity and miscarriage, that fact did not taint the whole proceedings so as to prevent the plaintiff recovering upon the other evidence which was sufficient to establish his case. But although the other evidence rendered the evidence improperly admitted immaterial, the Judicial Committee, as there had been an irregularity in the Court below in affirming the judgment, refused to give the costs of the appeal. BOMMARAUZE BAHADUR *v.* RANGASAMY MUDALY **[6 Moore's I. A., 232**

62. ——— *Evidence given without cross-examination and without opportunity of cross-examination.*—Evidence given when a party never had the opportunity either to examine or to cross-examine the witnesses, or to rebut their testimony by fresh evidence, is not legally admissible for or against him, unless he consents that it should be so used. GORACHAND SIRKAR *v.* RAM NARAIN CHOWDHRY . . . . . **9 W. R., 587**

WITNESS—CIVIL CASES—*continued.*

6. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

63. ——— Evidence to contradict witness.—*Contradiction of witness to collateral questions.—Right to call evidence to contradict.*—The rule limiting the right to call evidence to contradict witnesses on collateral questions excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute, the test being whether the fact is one which the party proposing to contradict would have been allowed himself to prove in evidence. GULAM ALLI BIN KAZI ISMAIL *v.* AGA KHAN . . . **6 Bom., O. C., 93**

64. ——— Evidence of experts.—*Proof of signatures.*—In a suit for arrears of rent for 1273 at an enhanced rate, plaintiff relied upon an agreement said to have been executed by defendant in that year. The Assistant Collector found that the agreement had not been executed by defendant. On appeal, the Judge called an expert who proved that the signatures of the attesting witnesses were not all genuine, and the decision of the Assistant Collector was affirmed. *Held* that the Judge was wrong in calling for and acting upon the evidence of the expert. BINDESSUREE DUTT SINGH *v.* DOMA SINGH **[9 W. R., 88**

65. ——— Consent to be bound by particular witness.—*Evidence not legally admissible.*—An *à priori* consent to abide by the testimony of a certain witness cannot bind the consenting party to hearsay testimony, but only to such evidence as is legally admissible,—*i.e.*, evidence as to such facts as the witness can directly speak to. LUCKEEMONEE DOSSEE *v.* SHUNKUREE DOSSEE **[2 W. R., 252**

MUNNOO SINGH *v.* AMRUT LALL . **5 W. R., 234**

66. ——— *Witness sworn in particular manner.*—Where the plaintiff rested her claim solely on the deposition of the defendant to be taken by his placing his hand on a particular text of the Koran, and the defendant not being examined in that way but in the usual way, did not prove the claim,—*Held* that the Court was not right in allowing the plaintiff to examine further witnesses and to reopen her case. MAHOMED SALEH *v.* MURIAMOONISSA . . . **10 W. R., 284**

67. ——— *Plaintiff agreeing to be bound by defendant's evidence.—Statements obviously untrue.*—Where the defendant on examination makes statements which amount to nothing and are manifestly untrue, the plaintiff cannot be bound by them, even though he had agreed to be bound by what the defendant said. GOOROODOSS ROY *v.* GREEDHUR SEIN . . **11 W. R., 110**

68. ——— *Subsequent refusal.—Duty of Court.*—Where a defendant, after asking the lower Appellate Court to summon plaintiff as a witness, and consenting to abide by his deposition, had again petitioned the Court that the plaintiff

WITNESS—CIVIL CASES—*continued.*

6. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

Evidence of experts—*continued.*

should not be examined,—*Held* that defendant should not have been bound solely and absolutely by the plaintiff's deposition, but that the other evidence on the record should also have been considered. JUGDEO SINGH *v.* MOLAZIM HOSSEIN . **13 W. R., 108**

(*b*) CROSS-EXAMINATION.

69. ——— Right to cross-examine.—*Witness called by the Court.*—A witness called by the Court is liable to be cross-examined by any of the parties to a suit. TARINI CHARAN CHOWDHRY *v.* SARODA SUNDARI DASI **[3 B. L. R., A. C., 145: 11 W. R., 468**

70. ——— *Witness called by Court.*—A party summoned by the Court to give evidence is not only required to give answers to the questions put to him by the Court, but the opposite party has a right to cross-examine him. The statement of any person examined is not admissible unless the opposite party has had the opportunity of cross-examining him. GOOROODOSS ROY *v.* GREEDHUR SEIN . . . . . **11 W. R., 110**

SHURFURAZ MOLLAH *v.* DHUNOO **[16 W. R., 257**

71. ——— *Co-defendant separately represented.*—One co-defendant, whose interests are separately represented, may cross-examine another. NARASIMMA *v.* KISTNAMA . **1 Mad., 456**

72. ——— *Recall of witnesses.—Omission to give opportunity for cross-examination.*—A Court of first instance decreed a case *ex parte* in favour of the plaintiff, and at a rehearing did not recall the plaintiff's witnesses, whom, therefore, the defendant had no opportunity to cross-examine, and again gave a decree for the plaintiff. The lower Appellate Court rejected the evidence of plaintiff's witnesses, and reversed the decree. *Held* that the Court of first instance should have recalled the plaintiff's witnesses, and given the defendant an opportunity of cross-examination. RAM BAKS LALL *v.* KISHORI MOHAN SHAHA **[3 B. L. R., A. C., 273: 12 W. R., 130**

73. ——— *Refusal to allow cross-examination.—Act VIII of 1859, s. 170.*— A defendant failed to appear when ordered to attend under section 170, Act VIII of 1859. The Judge did not at once pass judgment against him, but called the plaintiff's witnesses, and refused to allow the defendant's vakil, who was present, to cross-examine them. *Held* that the Judge ought to have allowed the defendant's vakil to cross-examine the plaintiff's witnesses. PAKAKTAR *v.* JAKBIRAM BHAKAT . . . . . **2 B. L. R., Ap., 12**

74. ——— Refusal of witness to answer questions on cross-examination.—*Civil procedure Code, 1859, s. 169.*—"*Lawful excuse.*"—

WITNESS—CIVIL CASES—*continued.*

6. EXAMINATION OF WITNESSES—*continued.*

(*b*) CROSS-EXAMINATION—*continued.*

Refusal of witness to answer question on cross-examination—*continued.*

A party to a suit tendering himself as a witness, and declining without lawful excuse to answer questions put on cross-examination, was liable to be dealt with under section 169 of the Civil Procedure Code. "Without lawful excuse" means such an excuse as would in law justify the refusal to give evidence. LEKH RAJ *v.* PALEB RAM **[1 N. W., 162: Ed. 1873, 241**

7. CONSIDERATION AND WEIGHT OF EVIDENCE.

75. ——— Credibility of witnesses.—*Power to set aside decision on evidence.*—The credibility of witnesses is a matter altogether for the Court of first instance and the Court which hears a regular appeal; and if these Courts are satisfied that the witnesses are not to be believed, their decision cannot be set aside by the High Court on special appeal, even though upon a general view of the case it should think that, if it had tried the case originally, it might have come to a different conclusion. GOUREE PERSHAD KOONDOO *v.* PRANNATH SURMAH **[10 W. R., 365**

76. ——— *Mode of testing credibility.—Several witnesses to same facts.*—In examining evidence, with a view to test whether several witnesses who bear testimony to the same facts are worthy of credit, it is important to see whether they give their evidence in the same words, or whether they substantially agree, not, indeed, concurring in all the minute particulars of what passed, but with that agreement in substance, and that variation in unimportant details, which are usually found in witnesses intending to speak the truth, and not tutored to tell a particular story. NANA NABAIN RAO *v.* HUREEE PUNTH BHAO **[Marsh., 436: 9 Moore's I. A., 96**

77. ——— *Witnesses called to support case giving evidence contrary to it.*—A party who calls a witness to give evidence on his behalf is not necessarily bound by his evidence; but if the evidence is at variance with the truth of his case (*e.g.*, if a witness called to prove execution of a document swears that it was not executed and has the means of knowing the fact), it throws a suspicion on the case which renders the clearest testimony necessary to establish its truth. FUZEELUN BEEBEE *v.* OMDAH BEEBEE . . . . . **10 W. R., 469**

78. ——— *Credit on other matters of witnesses, supporting a false case.*—Although it does not necessarily follow that where a witness gives evidence on a particular fact in a case and that fact is found against his evidence, he is to be entirely disbelieved on the other parts of the case he has spoken to, yet where witnesses who were not merely giving an opinion upon an isolated fact in the case, but came into Court to prove the whole case

WITNESS—CIVIL CASES—*continued.*

7. CONSIDERATION AND WEIGHT OF EVIDENCE—*continued.*

Credibility of witnesses—*continued.*

made by the plaintiffs, and that a very special case, and it is shown to be a case false in its material features, much reliance cannot be placed on their evidence as to any particular questions in the case. HABEEBOOLLAH *v.* GOUHUR ALLY KHAN [18 W. R., P. C., 523

79. ——— Ground for refusal to consider evidence.—*Non-production of best evidence.*—The principle that a plaintiff is bound to produce the best evidence in his power was held not to justify a Judge in omitting to consider the weight and legal effect of the remaining witnesses, when plaintiff had failed to produce the most important witness. LATORE MISTREE *v.* AGAMUDDEE NUSHYO [14 W. R., 482

80. ——— Mode of weighing evidence.—*Consideration of motives for bringing a suit.*—Where the evidence in support of a case is doubtful, the Court, in weighing that evidence, may properly take into consideration the motives imputed to the plaintiff as having induced him to sue. BIRCH *v.* FURZIND ALI . . . . 3 N. W., 303

81. ——— Estimating value of evidence.—*Witness swearing affirmatively to fact.*—In estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not. CHOWDHRY DEBY PERSAD *v.* CHOWDHRY DOWLUT SINGH [6 W. R., P. C., 55 : 3 Moore's I. A., 347

82. ——— *Credit of witness, a servant or dependant of plaintiff.*—The circumstance of a witness being a servant or a dependant of the plaintiff does not of itself disentitle him to credit. SHOOBUL CHUNDER KULLEAH *v.* KOYLASH CHUNDER MAL . . . . . 14 W. R., 23

83. ——— *Rejection of evidence unnecessarily and unjustifiably.*—*Held* by NORMAN, *J.*, that the Judge was not at liberty to reject, as matters which he could wholly leave out of consideration, any of the evidence before him in a case where the witnesses were unimpeached in their general character and uncontradicted by any testimony on the other side, and where there was no improbability in the facts which they related, and that the probative force arising from concurrent testimony was the compound ratio of the probabilities of the testimonies taken singly. RADHA KANT DEB *v.* KHEMA DOSSEE . . 7 W. R., 105

84. ——— *Evidence of witnesses found unreliable in criminal case.*—A Judge was held to have done wrong in throwing out the evidence of witnesses tendered by the defendant in a civil action merely because they have been found untrustworthy when examined with reference to a charge of breach of trust against the same defendant in a criminal case. LALL CHAND ROY *v.* BRINDABUN CHUNDER ROY . . . 13 W. R., 226

WITNESS—CIVIL CASES—*continued.*

7. CONSIDERATION AND WEIGHT OF EVIDENCE—*continued.*

Estimating value of evidence—*continued.*

85. ——— *Evidence of person who has been convicted of perjury or other offence.*—The evidence of a person who has been punished for perjury or of a person who has been convicted of a criminal offence can hardly be entitled to the credit that would be given to the testimony of a person against whom no such imputation can be brought. DOONGUN RAI *v.* DOORGA RAI [2 N. W., 97

86. ——— *Evidence of truth of witness.*—The observation that the evidence of a witness proves too much is not rebutted by the suggestion that it cannot be supposed that the witness was suborned, for, if he was possessed of common shrewdness, he would not have overdone the thing and then have given rise to such an objection. SOORIAH ROW *v.* COTAGHERY BOOCHIAH [5 W. R., P. C., 127 : 2 Moore's I. A., 113

87. ——— *Credibility of witnesses.—Professional witness.—Witnesses in former cases.*—The Privy Council, referring to the generality of the Principal Sudder Ameen's observations as to certain witnesses having given evidence in other cases, observed that, though it was a legitimate objection to a man's credit that he was a professional witness, yet to state broadly and generally that a witness had given evidence in other cases, and therefore became unworthy of credit, could only tend to increase the indisposition of respectable persons to come into Court as witnesses, which was one of the social evils of India. LALL BEHAREE LALL *v.* GOPEE BEEBEE . . 18 W. R., P. C., 285

88. ——— *Discrepancies in statements of witnesses.*—Discrepancies in an account of what took place in a conversation are not a sufficient ground for disbelieving statements made by different witnesses. BHAJU SING *v.* KAIFNATH TEWARI . . . 3 B. L. R., A. C., 332

89. ——— *Ground for discrediting witness.*—A bare allegation by a defendant in his written statement, without any proof in support of it, that a certain person is his inveterate enemy, is not sufficient to discredit that person's testimony. KASINATH SHAHA *v.* DWARKANATH SIRKAR . . 9 B. L. R., 215 : 17 W. R., 550

8. PRIVILEGES OF WITNESSES.

90. ——— Exemption from appearance in Court.—*Natives of rank, Prejudices of, to appear in Court.*—The prejudices of natives of rank to appear as witnesses in a Court of Justice will not be allowed to relax the rule that the best evidence must be produced of which the case is susceptible. RAM MOHUN MOOKERJEE *v.* NURSING DEB . 1 Ind. Jur., O. S., 63 : W. R., F. B., 54

NURSING DEB *v.* RAM MOHUN MOOKERJEE [Marsh., 176 : 1 Hay, 379

WITNESS—CIVIL CASES—*continued.*

8. PRIVILEGES OF WITNESSES—*continued.*

Exemption from appearance in Court—*continued.*

See MANICKRAM *v.* RAMYAD RAM [2 W. R., 63

RADHA KISTO SINGH DEO *v.* GUDADHUR BANERJEE . . . . . 8 W. R., 453

KALEE CHUNDER CHOWDHRY *v.* SURUT SOONDUREE DEBIA . . . . 18 W. R., 45

91. ——— Exemption from suit in respect of evidence.—*Action for damages.—False evidence.*—Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding. If their evidence be false, they should be proceeded against by an indictment for perjury. GUNESH DUTT SING *v.* MUGNEERAM CHOWDHRY [11 B. L. R., P. C., 321: 17 W. R., 283

WITNESS—CRIMINAL CASES.

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1. PERSON COMPETENT TO BE WITNESS	6248
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See CASES UNDER ACCOMPLICE.

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See CASES UNDER CRIMINAL PROCEDURE CODE, 1882, ss. 288, 289.

See CASES UNDER EVIDENCE—CRIMINAL CASES.

See CASES UNDER EVIDENCE ACT, 1872, s. 33.

See CASES UNDER FALSE EVIDENCE.

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WITNESS—CRIMINAL CASES—*continued.*

——— Cross-examination of—

See RECOGNISANCE TO KEEP PEACE—FORFEITURE OF RECOGNISANCES. [I. L. R., 4 Calc., 865

——— Person appearing as, Statement of—

See CRIMINAL PROCEDURE CODE, 1882, s. 164 (1872, s. 122). [I. L. R., 2 Bom., 643 I. L. R., 4 Bom., 15

1. PERSON COMPETENT TO BE WITNESS.

1. ——— Judge.—*Competent witness.*—A Judge is a competent witness, and can give evidence in a case being tried before himself, even though he laid the complaint, acting as a public officer, provided that he has no personal or pecuniary interest in the subject of the charge, and he is not precluded thereby from dealing judicially with the evidence of which his own forms a part. QUEEN *v.* MUKTA SING . 6 B. L. R., A. Cr., 15: 13 W. R., Cr., 60

See ROUSSEAU *v.* PINTO . . 7 W. R., 190

2. ——— Magistrate.—*Evidence Act, s. 121.—Power of Sessions Judge to compel Magistrate to give evidence.—Privilege of witness.*—A Sessions Judge finding, in the course of a trial, as regards the examination of the accused person taken by the committing Subordinate Magistrate, that the provisions of section 346 of Act X of 1872 had not been fully complied with, summoned the committing Magistrate and took his evidence that the accused person duly made the statement recorded. The Magistrate of the district objected to this proceeding of the Sessions Judge, contending that it was "contrary to law." The Sessions Judge referred the question, whether or not his proceeding was contrary to law, to the High Court. *Per* STUART, *C. J.*, PEARSON, *J.*, OLDFIELD, *J.*, and STRAIGHT, *J.*—That the privilege given by section 121 of Act I of 1872 is the privilege of the witness,—*i.e.*, of the Judge or Magistrate of whom the question is asked: if he waives such privilege, or does not object to answer such question, it does not lie in the mouth of any other person to assert the privilege: the reference, the objection not having been taken by the Subordinate Magistrate but by the Magistrate of the district, should be answered accordingly. *Per* SPANKIE, *J.*—That a Sessions Judge, while trying a case, cannot compel a committing Magistrate to answer questions as to his own conduct in Court as such Magistrate. EMPRESS OF INDIA *v.* CHIDDA KHAN . I. L. R., 3 All., 573

3. ——— *Judge trying case.—Magistrate witness of facts.*—In a case in which a Deputy Magistrate took an active part in the capture of parties charged with having been members of an unlawful assembly,—parties whom he himself tried on that charge,—it was held that he was bound to state to the accused, so far as he could, what were the facts he himself observed, and to which he himself could bear testimony; and the prisoner in such

WITNESS—CRIMINAL CASES—*continued.*

1. PERSON COMPETENT TO BE WITNESS —*continued.*

Magistrate—*continued.*

situation had a right, if he thought it desirable, to cross-examine the Judge, whose evidence should be recorded, and form part of the record in the case. The proper course, however, for the Deputy Magistrate to have taken in this case would have been to decline to try the case, and to ask that it should be undertaken by some other Judge. IN THE MATTER OF THE PETITION OF HURBO CHUNDER PAUL [20 W. R., Cr., 76

4. ——— *Conviction, Illegality of.*—A Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact. *Per* MARKBY, *J.*—Where in such a case he has given his evidence and convicted the accused, his having so acted makes the conviction bad. *Per* PRINSEP, *J.*—The conviction is not absolutely bad. It is open to the Court to uphold the conviction, if it is of opinion that, after rejecting the Magistrate's evidence, there is other evidence sufficient, if believed, to support the conviction. EMPRESS *v.* DONNELLY . . . I. L. R., 2 Calc., 405

5. ——— *Magistrate sitting on Bench in Appellate Court.—Liability to be examined as witness.*—It is undesirable that Magistrates, whose decisions are under appeal, or who have been engaged in promoting the prosecution as police officers concerned in a case, should sit on the Bench beside or converse privately in Court with the Judge who is engaged in trying the prisoner's appeal. If the Appellate Court wishes to ascertain any facts relating to the case from the Magistrate who convicted the accused, he should examine the Magistrate on oath or solemn affirmation in the same manner as an ordinary witness. REG. *v.* KASHINATH DINKAR . . . . 8 Bom., Cr., 126

6. ——— *Examination of Magistrate trying case.*—Case in which the High Court permitted a Deputy Magistrate to be examined on behalf of a petitioner whose case was investigated by the Deputy Magistrate. QUEEN *v.* MUDHOOSOODUN ROY . . . 16 W. R., Cr., 49

See S. 121 OF THE EVIDENCE ACT, 1872.

7. ——— Prisoner.—*Tendering pardon to prisoner.*—Procedure as to tendering a pardon to a prisoner before examining him as a witness, discussed. QUEEN *v.* GAGALU [6 B. L. R., Ap., 50: 12 W. R., Cr., 80

8. ——— *Co-defendants, Examination of, as witnesses.*—Where there is no community of interest, any one of a number of prisoners jointly indicted may be called as a witness either for or against his co-defendants. QUEEN *v.* ASHRUFF SHEIK . . . 6 W. R., Cr., 91

9. ——— *Prisoners tried together jointly.—Examination of one as witness against another.*—Where two prisoners are tried together for different offences committed in the same

WITNESS—CRIMINAL CASES—*continued.*

1. PERSON COMPETENT TO BE WITNESS —*continued.*

Prisoner—*continued.*

transaction, it is improper and illegal to examine one prisoner as a witness against the other. IN THE MATTER OF DAVID . . . 5 C. L. R., 574

10. ——— Person brought up with accused and not discharged.—A person apprehended by the police and brought before the Magistrate with the accused, is, though not discharged by the Magistrate, a competent witness against the accused, provided he be not charged along with the accused. REG. *v.* NARAYAN SUNDAR [5 Bom., Cr., 1

11. ——— Evidence of woman on charge of adultery.—A person may call the woman with whom he is accused of having had sexual intercourse as a witness on his behalf. IN RE BECHOO [6 W. R., Cr., 92

2. SUMMONING WITNESSES.

12. ——— Dispensing with personal attendance of witnesses.—*Deposition.—Trial before Sessions Court.*—It is only in extreme cases of delay or expense that the personal attendance of a witness before the Court of Session should be dispensed with, and the evidence given by him before the committing Magistrate referred to. EMPRESS *v.* MULU . . . . I. L. R., 2 All., 646

13. ——— Application to enforce attendance of witnesses.—*Witnesses for defence. —Examination of accused.*—In a case under Chapter XV, Code of Criminal Procedure, 1861, it was incumbent on the accused either to produce their witnesses or to apply beforehand for a summons to enforce the attendance of any witness who was not likely to appear without a summons; it was not necessary in such cases to record the examination of the accused with the same formalities as in cases under Chapters XII and XIV. QUEEN *v.* CHEDEE KOONJRA [14 W. R., Cr., 76

14. ——— Discharge of witness from attendance.—It is incumbent upon a Court when it discharges a witness from the duty of attendance before the trial is ended to ascertain from the accused whether he has, or is likely to have, any need of the witness's testimony; and if he has such need, then to take such steps for insuring the presence of the witness at the required time as may be necessary. KHURRUCKDHAREE SINGH *v.* PERSHADEE MUNDUL [22 W. R., Cr., 44

15. ——— Discretion of Court as to summoning witnesses.—*Criminal Procedure Code, 1872, s. 192.—Discretion of Magistrate as to examining witnesses.*—It is entirely within the discretion of a Magistrate conducting a trial in a warrant case to admit evidence on behalf of either side at any stage of the trial, section 192, Act X of 1872, applying to such a case; but the Magistrate, in

WITNESS—CRIMINAL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

Discretion of Court as to summoning witnesses—*continued.*

exercising the discretion conferred on him by this section, ought to have good reason for allowing witnesses on the part of the prosecution to be interposed in the midst of the case of the accused. QUEEN *v.* KASSY SINGH. QUEEN *v.* HULKOREE SINGH [21 W. R., Cr., 61

16. ——— **Duty of Court as to summoning witnesses.**—*Criminal Procedure Code, 1872, s. 359.—Adjournment for appearance of witnesses for defence.*—Certain persons were charged before the Magistrate with rioting, and being called upon for their defence, named several witnesses, and summonses on the following morning were issued for their appearance, but they were not found. The accused then applied for further time for the appearance of the witnesses. This the Magistrate refused to grant, and convicted the accused. *Held, per* JACKSON, *J.*, that this being a warrant case it was the duty of the Magistrate to summon the witnesses that might be offered by the accused, and that he might at his discretion have adjourned the case. *Held*, further, *per* JACKSON, *J.*, that the meaning of section 359 of the Criminal Procedure Code is, that if among the persons named by the accused as witnesses, the Magistrate considers that any witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material; but that the section is not intended to enable the Magistrate to enquire into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused; and further, that in the present case there was not any purpose of vexation or delay, and that by the refusal to grant further time the accused had been probably prejudiced in their defence. EMPRESS ON THE PROSECUTION OF DENONATH GHATTACK *v.* RAJCOOMAR SINGH . . . . I. L. R., 3 Calc., 573

S. C. IN THE MATTER OF THE PETITION OF RAJCOOMAR SINGH . . 2 C. L. R., 62

17. ——— *Obligation to summon witnesses.—Criminal Procedure Code, 1861, Ch. XIV.*—In a case tried under the provisions of Chapter XIV of the Code of Criminal Procedure, the accused were entitled to have their witnesses summoned, and a Magistrate had no power to refuse to summon them. QUEEN *v.* DOORGAGUTTY [11 W. R., Cr., 55

18. ——— *Discretion of Magistrate.—Criminal Procedure Code, 1861, s. 262.—Held* by BAYLEY, *J.* (MARKBY, *J., dubitante*), that a Magistrate had a discretion, under section 262 of the Code of Criminal Procedure, to summon a witness when he was likely to give material evidence on behalf of the accused. IN THE MATTER OF THE PETITION OF AMEER CHAND NOHATTA. QUEEN *v.* AMEER CHAND NOHATTA . 13 W. R., Cr., 63

WITNESS—CRIMINAL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

Duty of Court as to summoning witnesses—*continued.*

19. ——— *Forcibly rescuing cattle.—Act III of 1857, s. 13.—Criminal Procedure Code, 1861, s. 262.—Summoning witnesses.*—In a case of forcibly rescuing cattle under section 13, Act III of 1857, in which the accused did not summon any witness, it was held that, even if the accused wanted them summoned, the Magistrate, under section 262 of the Code of Criminal Procedure, need not have summoned them, unless persuaded that they were likely to give material evidence and that they would not attend voluntarily. AKBAR TAGUDGEER *v.* PUNCHOO BISWAS . . 10 W. R., Cr., 42

20. ——— *Duty of parties.—Criminal Procedure Code, 1861, ss. 261, 262.—Attendance of witnesses.*—In a case under Chapter XV of the Code of Criminal Procedure, it was expected that parties would bring their own witnesses with them. If they required the attendance of any witness they should apply to the Magistrate to cause his attendance; and where they did not so apply, it was sufficient if the Magistrate recorded in his judgment the substance of the defendant's answer. BAGDEE MANJEE *v.* MOHINDRO NARAIN [10 W. R., Cr., 16

21. ——— *Criminal Procedure Code, 1861, s. 186.*—In the case of a charge of an offence triable by the Court of Sessions alone, the Magistrate was bound, under section 186 of the Criminal Procedure Code, to summon the complainant's witnesses. QUEEN *v.* ZAKIR ALLY [8 W. R., Cr., 4

22. ——— *Criminal Procedure Code, 1861, s. 375.—Accused person, Right of.*—An accused person is entitled to have examined as a witness any person named in his list of witnesses delivered to the Magistrate: and the Magistrate should take measures to enforce the attendance of such person. QUEEN *v.* ISHAN DUTT [6 B. L. R., Ap., 88: 15 W. R., Cr., 34

23. ——— *Criminal Procedure Code (Act XXV of 1861), ss. 188, 207, 227, and 228.—Arrest and detention of witnesses.*—Section 207 of the Criminal Procedure Code gave no power to the Magistrate to call up and examine witnesses for the defence whose names have been given in a list, under section 227, when the prisoners reserve their defence for the Court of Session; but under section 228 he was bound to summon them to give evidence before the Court of Session. IN THE MATTER OF MAHESH CHANDRA BANERJEE. QUEEN *v.* PURNA CHANDRA BANERJEE. QUEEN *v.* KALI SIRKAR [4 B. L. R., Ap., 1: 13 W. R., Cr., 1

24. ——— *Credibility of witnesses.*—It is the Magistrate's duty to summon witnesses for the accused who can speak to the facts of the case, and he ought not to determine beforehand what credit he will give to their evidence. IN

WITNESS—CRIMINAL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

Duty of Court as to summoning witnesses—*continued.*

THE MATTER OF THE PETITION OF MAHIMA CHANDRA SHAH
[4 B. L. R., Ap., 78 : 15 W. R., Cr., 15

25. ——— *Criminal Procedure Code, 1861, ss. 186, 262.*—Section 186 of the Code of Criminal Procedure referred to cases under Chapter XII, which were triable by the Court of Session, and not to cases under Chapter XV, which were triable by a Magistrate. To the latter cases section 262 applied. BOIDDONATH BANIA *v.* BHEEDOO DOSS . . . . . 9 W. R., Cr., 3

26. ——— *Right of accused to have witnesses summoned.—Criminal Procedure Code, 1872, s. 363.*—Under section 363, Code of Criminal Procedure, a prisoner was entitled, as a matter of right, to have any witnesses named in the list which he delivered to the Magistrate, summoned and examined. QUEEN *v.* PROSUNNO COOMAR MOITRO
[23 W. R., Cr., 56

27. ——— *Criminal Procedure Code, 1861, s. 253.*—Under section 253 of the Criminal Procedure Code, 1861, it was imperative on the Magistrate to summon the witnesses named by the prisoner. QUEEN *v.* MUDSOODDEEN
[2 N. W., 148

28. ——— *Summoning witnesses for accused.—Criminal Procedure Code (Act XXV of 1861), s. 253.—Per* AINSLIE, *J.*—In a trial under Chapter XIV of the Criminal Procedure Code, the Magistrate was not bound, under section 253, to summon any witness whom the accused might require. It was only discretionary with him to do so, and in the circumstances of the present case, he exercised his discretion rightly in refusing to summon the witnesses asked for. *Per* PAUL, *J.* (differing).—The right of an accused to have witnesses for his defence summoned during the pendency of the trial is an ordinary and natural right, and this right was not taken away, but affirmed, by section 253; the Magistrate was bound to summon the witnesses, though it was discretionary with him to adjourn the trial. In the present case, treating it as a matter of discretion only, the Magistrate was wrong in refusing to summon the witnesses required. QUEEN *v.* BHOLANATH MOOKERJEE
[7 B. L. R., 564 : 16 W. R., Cr., 28

29. ——— *Discretion of Magistrate.—Criminal Procedure Code, 1861, ss. 253, 262, 263.*—Section 253 of the Criminal Procedure Code did not apply to cases triable under Chapter XV of that Code; and sections 262 and 263 were applicable when the offence was not punishable with more than six months' imprisonment; and it was in the discretion of the Magistrate to summon the witnesses for the defence, if he considered their evidence essential to the just decision of the case, and incumbent on him to summon them only if it appeared to him that they were likely to give materia

WITNESS—CRIMINAL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

Duty of Court as to summoning witnesses—*continued.*

evidence on behalf of either party, and that they would not voluntarily appear for the purpose of being examined at the time and place appointed for the hearing of the complaint. QUEEN *v.* MOHUREE
[2 N. W., 393

30. ——— *Discretion of Magistrate.—Criminal Procedure Code, 1861, ss. 227, 228.*—Where a prisoner, under section 227, Code of Criminal Procedure, gave in a list of the witnesses he wished to summon, after his case had been committed, the Magistrate was bound to exercise his discretion upon the point, and to state whether he would summon the witnesses or not, and he ought to state his reasons for not doing so. If he thought the witnesses were included in the list for the purpose of delay, he should proceed under section 228 of the Code. QUEEN *v.* RAJCOOMAR MOOKERJEE
[16 W. R., Cr., 14

31. ——— *Discretion of Magistrate.—Criminal Procedure Code, 1872, ss. 215, 362.*—It was not incumbent on a Magistrate to summon every person named as a witness by the complainant. Section 215, explanation 3 of the Criminal Procedure Code, 1872, must be read with section 362, which vested a discretionary power in the Magistrate. JELDHARI SINGH *v.* SHUNKUR DOYAL
[23 W. R., Cr., 9

See, however, EMPRESS *v.* HEMATULLA
[I. L. R., 3 Calc., 389

EMPRESS OF INDIA *v.* KASHI
[I. L. R., 2 All., 447

QUEEN *v.* PURASURAMA NAIKAR
[I. L. R., 4 Mad., 329

ANONYMOUS CASE . . 8 Mad., Ap., 5

32. ——— *Criminal Procedure Code, 1861, Ch. XIV.*—In a case of an offence (such as hurt, under section 323, Penal Code) punishable with imprisonment exceeding six months, and therefore falling under Chapter XIV of the Code of Criminal Procedure, a Magistrate was bound to summon all the witnesses required by the accused. QUEEN *v.* BOOLAKEE . . 14 W. R., Cr., 81

33. ——— *Criminal Procedure Code, 1869, s. 131.—Claims to stolen property.*—Petitioner was charged with the theft of certain money found in his house and acquitted. Proclamation having been made for claimants to come in and claim the property, no one appeared, whereupon petitioner preferred his claim and asked the Assistant Magistrate to summon certain witnesses, but the Assistant Magistrate refused to do so, and disallowed his claim, the Magistrate on appeal declining to interfere. On reference by the Judge, the High Court held that the Assistant Magistrate was bound to summon the witnesses named by the petitioner, set aside that officer's order, and directed him to dispose of the case after taking due steps for securing the

WITNESS—CRIMINAL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

Duty of Court as to summoning witnesses—*continued.*

attendance of the witnesses in question. SOOKHAN SAHOO *v.* GOVERNMENT . . . **18 W. R., Cr., 5**

34. ——— *Issue of summons.—Criminal Procedure Code (Act XXV of 1861), s. 318.*—Although there was no mention in Chapter XXII of Act XXV of 1861 of any particular provisions under which witnesses might be summoned, yet it was the duty of the Court, if parties could not procure the attendance of their witnesses, to issue summonses for their attendance. IN THE MATTER OF THE PETITION OF SHAMASANKAR MAZUMDAR **[9 B. L. R., Ap., 45**

SHAMASUNKUR MOZOOMDAR *v.* ANUNDMOYEE DASSYA . . . . **18 W. R., Cr., 64**

35. ——— *Ground for postponement of case.*—A Magistrate was held to be right, under the circumstances, in not postponing the case for the purpose of summoning witnesses for one of the parties. IN THE MATTER OF THE PETITION OF GABINDA CHANDRA GHOSE. **9 B. L. R., Ap., 39**

36. ——— *Non-attendance of witnesses.—Criminal Procedure Code, 1861, s. 269.—Ground for adjournment of trial.*—In a trial held under Chapter XV of the Criminal Procedure Code, it was not an irregularity to adjourn the trial, under section 269, for the purpose of allowing the accused to secure the attendance of his witnesses. As a general rule, a prisoner should have his witnesses present on the day of trial. QUEEN *v.* DINOO ROY **[16 W. R., Cr., 21**

37. ——— *Refusal of a Magistrate to summon prisoner's witnesses.—Criminal Procedure Code (Act X of 1872), s. 359.*—A Magistrate was not at liberty to refuse to summon a witness tendered by an accused person, except on the grounds specified in section 359 of the Criminal Procedure Code; and if he did refuse, he was bound to proceed under that section. The fact that the accused declines to examine a witness is no reason for refusing to summon him to meet fresh evidence given subsequent to the defence being closed. IN THE MATTER OF THE PETITION OF DEELA MAHTON *v.* SHEO DYAL KOERI . **I. L. R., 6 Calc., 714**

S. C. IN THE MATTER OF DEELA MAHTON **[8 C. L. R., 70**

38. ——— *Criminal Procedure Code, 1872, s. 359.—Witness for the defence.—Failure to attend.—Refusal to re-summon.*—On the 30th March 1881 an accused person on his trial before a Magistrate asked that a certain witness might be summoned on his behalf. The Magistrate ordered a summons to be issued for the attendance of such witness on the 18th April, to which day the further hearing of the case was adjourned. There was some delay in the service of the summons, and such witness did not attend on that day. The Magistrate refused an application by the accused for

WITNESS—CRIMINAL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

Duty of Court as to summoning witnesses—*continued.*

the issue of a second summons to such witness, with reference to section 359 of Act X of 1872, on the ground that such application was not made in "good faith." *Held* that the provisions of section 359 of Act X of 1872 were clearly inapplicable to the case as it stood before the Magistrate on the 18th April, and he was bound to make a further attempt—the first attempt seemed to have been nominal merely—to secure the attendance of the absent witness. EMPRESS *v.* RUKN-UD-DIN . **I. L. R., 4 All., 5**

39. ——— *Witness for defence.—Refusal by Magistrate to summon witness under Criminal Procedure Code, 1882, s. 216.—Witness summoned by Sessions Court.—Criminal Procedure Code, 1882, ss. 291, 540.*—Upon the committal of certain persons for trial before the Sessions Court for offences under the Penal Code, each of the prisoners, under section 211 of the Criminal Procedure Code, gave in a written list of the persons whom he wished to be summoned to give evidence at the trial. On each of these lists the name of a particular person was entered, who objected under section 216 to being summoned, on the ground that the summons was desired for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material. Upon this objection, the committing Magistrate passed an order requiring the prisoners to satisfy him that there were reasonable grounds for believing that the objector's evidence was material, and, having heard arguments on both sides, passed an order refusing to issue the summons. The only ground stated by the Magistrate for this order was that he thought the reasons assigned for the application to have the objector summoned were insufficient. Subsequent to the order, and before the trial in the Sessions Court had begun, the Sessions Judge, upon an application filed on behalf of the prisoner, passed an order directing that the objector should be summoned to give evidence. The order assigned no reasons, and was passed in the absence of the objector or of any person representing him, and without notice to show cause being issued to him. The objector applied to the High Court for revision of the order on the ground that the Sessions Judge had no jurisdiction to make it. *Held* that when a Magistrate refuses, under section 216 of the Criminal Procedure Code, to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material; that the ground stated by the Magistrate, *viz.*, that the reasons assigned for the application to have the objector summoned were insufficient, did not show that the evidence was not material; that the Sessions Judge had jurisdiction to make the order complained of; and that, even if he had not, it would not, under the circumstances, be desirable to interfere with his order in revision. *Per* STRAIGHT, *J.*, that section 540 is not the only provision of the Criminal Procedure Code which confers on a Sessions Judge powers of the kind exercised by him in this

WITNESS—CRIMINAL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

Duty of Court as to summoning witnesses—*continued.*

case. Under section 291, though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of right, yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate. IN THE MATTER OF THE PETITION OF THE RAJAH OF KANTIT [I. L. R., 8 All., 668

40. ——— *Refusal to summon witnesses not declared material unless expenses are paid.*—A prisoner who was about to be committed to the Sessions Court presented to the Magistrate a list of witnesses whom he desired to have summoned to give evidence on his behalf at the trial, and on being asked by the Magistrate why he desired to summon the witnesses, the prisoner declined to state his reason. *Held* that the Magistrate was at liberty to decline to summon the persons named in the list on the prisoner declining to satisfy him that they were material witnesses; but the Magistrate ought to have fixed the amount which he considered necessary to defray the cost of the attendance of the persons named, and intimated to the prisoner his readiness to issue summonses on that amount being deposited. The High Court called for the record for the purpose of seeing whether any of the persons named in the list were likely to be able to give material evidence. SUBHARAYA MUDALI *v.* QUEEN . 4 Mad., 81

41. ——— *Omission to take steps to summon witnesses.*—A complainant in a case who mentioned the names of several witnesses on his behalf was requested to produce them on a certain date. Instead of doing that he produced only two witnesses, who were examined. *Held* that, as the complainant did not apply to the Magistrate to issue summonses on the other witnesses, or ask him to proceed under section 262, Code of Criminal Procedure, 1861, the Magistrate was not wrong in law in deciding the case on the evidence which was before him. QUEEN *v.* NOTOBUR BEBA . 15 W. R., Cr., 87

42. ——— *Refusal to summon witness for accused.—Participation in charge.—Illegal conviction.*—A refusal to summon witnesses cited by an accused, on the ground of their being implicated in the charge, vitiates the trial and conviction. RAM SHAHAI CHOWDHY *v.* SANKER BAHADUR . 6 B. L. R., Ap., 65 : 15 W. R., Cr., 7

43. ——— *Refusal to summon witnesses named for the defence.*—Where the Subordinate Magistrate convicted certain persons without allowing them a proper opportunity for the summoning and attendance of witnesses named for the defence, the High Court quashed the conviction and directed the Subordinate Magistrate to re-hear the case. ANONYMOUS . . 5 Mad., Ap., 27

44. ——— *Criminal Procedure Code, 1872, s. 362.—Warrant case.—Refusal of*

WITNESS—CRIMINAL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

Duty of Court as to summoning witnesses—*continued.*

Magistrate to summon witness named by accused.—Error or defect in proceedings.—Where the Magistrate trying an offence rejected an application by the accused person that a certain person might be examined on his behalf either in Court or by commission, without recording his reasons for refusing to summon such person, as required by section 362 of the Criminal Procedure Code,—*Held* that the conviction of the accused person must be set aside, and the case be reopened by such Magistrate, and the application by the accused for the examination of such person be disposed of according to law. IN THE MATTER OF THE PETITION OF SAT NARAIN SINGH [I. L. R., 3 All., 392

45. ——— *Right of accused.—Compelling attendance of witnesses.—Evidence.—Criminal Procedure Code (Act X of 1882), s. 257.*—Certain witnesses who had been summoned for the accused failed to appear on the day of trial, and the Deputy Magistrate refused to adjourn the hearing, or to issue fresh processes for the attendance of the defendant's witnesses, on the ground that they were all friends of the accused who would come to Court if the accused desired it. The prisoners were convicted. *Held*, the conviction must be set aside: the Magistrate having once granted processes he was bound to assist the accused in enforcing the attendance of his witnesses. QUEEN-EMPRESS *v.* DHANANJOI CHOWDHRY . I. L. R., 10 Calc., 931

46. ——— *Non-attendance of witness, Enquiry into reasons for.—Criminal Procedure Code, 1861, s. 221.*—It was held that an enquiry should be made into the excuse given by a person for his non-attendance as a witness before enforcing a fine for such non-attendance, in order that the Sessions Judge, or other authority, might fairly exercise the discretion given him by section 221 of the Criminal Procedure Code. QUEEN *v.* AMEER KHAN. IN RE BHUGWAN DOSS . . 2 N. W., 113

47. ——— *Mode of summoning witnesses.—Recognisances to appear.*—A Subordinate Magistrate cannot bind over witnesses by recognisances to appear before himself. The proper course to enforce attendance is by summons, and, if that fails, by warrant. ANONYMOUS [4 Mad., Ap., 6

See ANONYMOUS . . . 4 Mad., Ap., 17

VENKATAPPAH *v.* PAPAMMAH . 5 Mad., 132

48. ——— *Criminal Procedure Code, 1861, s. 191.—Warrant to enforce attendance of witnesses.*—A Magistrate was not bound, under section 191 of the Code of Criminal Procedure, to enforce the attendance of witnesses by warrant except upon proof of due service of summons. IN THE MATTER OF THE PETITION OF ABDOOR RUHMAN . . . . 7 W. R., Cr., 37

QUEEN *v.* SUTHERLAND. QUEEN *v.* NARAIN SINGH . . . 14 W. R., Cr., 20

WITNESS—CRIMINAL CASES—*continued.*

2. SUMMONING WITNESSES—*continued.*

Duty of Court as to summoning witnesses—*continued.*

49. ———— *Issuing summons to witnesses out of jurisdiction.*—Magistrates may, under the Criminal Procedure Code, issue summonses for service upon witnesses beyond the limits of their districts. (COLLETT, *J.*, dissenting.) ANONYMOUS CASE . . . . . 3 Mad., Ap., 5

50. ———— *Service of summons.—Affixing summons to door of house.*—Service of summons on a witness by affixing it to the door of his house was held to be no evidence of his having received it, in a charge brought against him of disobeying the summons. ANONYMOUS [6 Mad., Ap., 29

51. ———— *Service of summons.*—The mere showing to a witness of a summons issued under section 186 of the Criminal Procedure Code 1861, is not sufficient service. Either the original should be left with the witness, or it should be exhibited to him, and a copy of it delivered or tendered. REG *v.* KARSANLAL DANATRAM [5 Bom., Cr., 20

3. AVOIDING SERVICE.

52. ———— Warrant for apprehension of witness.—*Committal of witness in default of appearance.—Criminal Procedure Code, 1861, s. 188.*—Section 188 only empowers a Magistrate to issue a warrant for the apprehension of a witness when he has reason to believe that the witness will not attend to give evidence without being compelled to do so, and it does not empower a Magistrate to commit a witness. IN THE MATTER OF MAHESH CHANDRA BANERJEE. QUEEN *v.* PURNA CHANDRA BANERJEE. QUEEN *v.* KALI SIRKAR [4 B. L. R., Ap., 1: 13 W. R., Cr., 1

4. SWEARING OR AFFIRMATION OF WITNESSES.

53. ———— Oath or affirmation.—*Criminal Procedure Code, 1861, s. 199.—Memorandum of deposition.*—A witness may be examined either on oath or on solemn affirmation, but he cannot both be sworn and put on solemn affirmation at the same time. The memorandum required by section 199 of the Code of Criminal Procedure should always be appended to the depositions. QUEEN *v.* HOSSEIN SIRDAR . . . . . 13 W. R., Cr., 17

5. EXAMINATION OF WITNESSES.

(*a*) GENERALLY.

54. ———— Power of Court to dispense with examination of witnesses.—*Criminal Procedure Code, 1872, s. 362.*—Section 362 of the Code of Criminal Procedure did not give a Magistrate discretion to dispense with the examination of witnesses summoned by the prosecution. QUEEN *v.* PARASURAMA NAIKAR . I. L. R., 4 Mad., 329

WITNESS—CRIMINAL CASES—*continued.*

5. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

Power of Court to dispense with examination of witnesses—*continued.*

55. ———— *Commitment without examining witnesses.*—Where a Magistrate committed a person charged with perjury in a trial before himself to the Sessions without examining the witnesses for the prosecution,—*Held* that the commitment was illegal. QUEEN *v.* CHINNA VEDAGIRI CHETTI . . . . . I. L. R., 4 Mad., 227

QUEEN *v.* SREENATH MOOKHOPADHYA [7 W. R., Cr., 45

DINONATH GOPE *v.* SARODA MOOKHOPADHYA [7 W. R., Cr., 47

56. ———— *Power of interference of High Court.—Criminal Procedure Code, 1861, s. 363.*—Where it was not shown that there were any witnesses forthcoming for examination other than those whom the Sessions Judge did examine, the Court refused, with reference to section 363, Code of Criminal Procedure, to interfere with the Sessions Judge's proceedings. QUEEN *v.* JUMDEM SINGH . . . 12 W. R., Cr., 73

57. ———— Duty of defence as to calling witnesses.—*Inference from failure to call witnesses.*—A prisoner or his counsel is at liberty to offer evidence or not as he thinks proper, and no inference unfavourable to him can be drawn because he takes one course rather than another. HURRY CHURN CHUCKERBUTTY *v.* EMPRESS [I. L. R., 10 Calc., 140: 13 C. L. R., 358

58. ———— Duty of prosecution as to calling witnesses.—*Inferences to be drawn on failure to call witnesses.—Misdirection.*—It is *primâ facie* the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution, and who must be able to give important information. If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution. The only thing that can relieve the prosecutor from calling such witnesses, is the reasonable belief that, if called, they would not speak the truth. No such corresponding inference can be drawn against an accused. IN THE MATTER OF THE PETITION OF DHUNNO KAZI. EMPRESS *v.* DHUNNO KAZI . I. L. R., 8 Calc., 121

S. C. DHUNNO KAZI *v.* EMPRESS [10 C. L. R., 151

59. ———— *Obligation to call witnesses examined before Magistrate.*—Where a Sessions Judge gave it as a sufficient reason for the non-production of certain witnesses in Court on the part of the prosecution, that they had been examined by the committing Magistrate against the express wish of the police officer in charge of the prosecution,—*Held* that that was not a valid ground for the non-production of the witnesses in the Sessions Court. In conducting a case for the prosecution, all

WITNESS—CRIMINAL CASES—*continued.*

5. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

Duty of prosecution as to calling witnesses—*continued.*

the persons who are alleged or known to have knowledge of the facts ought to be brought before the Court and examined. QUEEN-EMPRESS *v.* RAM SAHAI LALL . . **I. L. R., 10 Calc., 1070**

60. ——— *Trial in Sessions Court.—Non-production of material witnesses for Crown.—Duty of public prosecutor.*—It is the duty of the Public Prosecutor at a trial before the Court of Session to call and examine all material witnesses sent up to the Court on behalf of the prosecution, and the Judge is bound to hear all the evidence upon the charge. The Public Prosecutor is not bound to call any witnesses who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence; but in such circumstances he should explain to the Court that this is his reason for not calling those witnesses, and he should offer to put them in the box for cross-examination by the accused at their discretion. In the absence of any such explanation, or of other reasonable grounds apparent on the face of the proceedings, inferences unfavourable to the prosecution must be drawn from the non-production of its witnesses. QUEEN-EMPRESS *v.* TULLA . . **I. L. R., 7 All., 904**

61. ——— *Revival of prosecution.—Presidency Magistrates Act (IV of 1877), s. 87, expl. 2.*—A "revival of a prosecution," as mentioned in explanation 2 of section 87 of Act IV of 1877, is not a continuation of the original prosecution from which the accused has been discharged. On the revival of the prosecution, all the witnesses on whose evidence the prosecution intend to rely must be examined before the Magistrate; and if any of them were examined at the time of the original prosecution, they must be examined *de novo*. EMPRESS *v.* CHUNDER NATH DUTT **[I. L. R., 5 Calc., 121: 4 C. L. R., 305**

62. ——— **Witnesses for prosecution.** *—Witness examined by prosecution after defence.*—It is irregular to allow a witness to be examined on behalf of the prosecution after the prisoner has made his defence, when the witness is not one to contradict any new case set up by the prisoner. QUEEN *v.* CHOTEY LAL . . . . **3 N. W., 271**

QUEEN *v.* SHAMKISHORE HOLDAR **[13 W. R., Cr., 36**

Where, however, the prisoner had full notice of the evidence which was to be given by such witness, and made his defence, in allusion to the evidence of the witness, the High Court refused to set aside the conviction, having regard to section 439 of the Code of Criminal Procedure. QUEEN *v.* SHAM KISHORE HOLDAR . . . . **13 W. R., Cr., 36**

63. ——— *Criminal Procedure Code, 1861, s. 372.—Recalling witness for prosecution.*—Under section 372 of the Code of Criminal

WITNESS—CRIMINAL CASES—*continued.*

5. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

Witnesses for prosecution—*continued.*

Procedure an accused should be called upon to enter upon his defence and to produce his evidence when the case for the prosecution has been brought to a close. Where, therefore, one witness for the prosecution was recalled after the prisoner had made his defence, and the prisoner had no opportunity of calling evidence with reference to the evidence of that witness, the High Court quashed the conviction and ordered a new trial. QUEEN *v.* ASSANOOLLAH **[13 W. R., Cr., 15**

64. ——— **Witnesses for defence.**— *Criminal Procedure Code, 1861, s. 372.—Duty of Court as to witnesses for defence.*—Under section 372 of the Code of Criminal Procedure, the accused should be asked, at the end of the case for the prosecution, to produce his evidence, and it is at that point the duty of the Court of Session to ascertain who the witnesses are whom the prisoner desires to examine in his defence. QUEEN *v.* MOOKUN **[12 W. R., Cr., 22**

65. ——— *Omission to examine witnesses for accused.*—The Court quashed the sentence which was passed upon a prisoner who had not been asked if he had any witness to call, although he was tried at the same time with others who had been so asked. BHUGWAN *v.* DOYAL GOPE **[10 W. R., Cr., 7**

66. ——— *Criminal Procedure Code (Act XXV of 1861), s. 266.—Witnesses attending voluntarily.*—In cases coming under Chapter XXV of Act XXV of 1861, to which section 266 applied, and not section 252, the Magistrate was not obliged to call on the accused to produce his witnesses, but he was bound to hear them if they attended voluntarily, as by section 266, read with section 262, they were supposed to do. IN RE BHIKA ROY . . . . **7 B. L. R., 568, note**

S. C. BHIKHA ROY *v.* DHOTUN ROY **[10 W. R., Cr., 36**

67. ——— *Obligation of Magistrate to hear witnesses.—Criminal Procedure Code, 1861, s. 266.*—Section 266 of the Code of Criminal Procedure only required the Magistrate to hear such witnesses as the accused shall produce in his defence. ANONYMOUS . . **4 Mad., Ap., 29**

QUEEN *v.* AMEER CHAND NOHATTA **[13 W. R., Cr., 63**

68. ——— *Refusal of Court to allow witness for defence to be examined.—Illegal conviction.—Criminal Procedure Code (Act XXV of 1861), s. 266.*—Conviction set aside on the ground of the Magistrate's irregularity in refusing, in a trial before him under Chapter XV of the Criminal Procedure Code, to allow the examination of a witness who had been tendered on behalf of the accused. QUEEN *v.* MAHIMA CHANDRA CHUCKERBUTTY **[4 B. L. R., Ap., 77 : 12 W. R., Cr., 77**

WITNESS—CRIMINAL CASES—*continued.*

5. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

69. ——— Recording evidence of witness.—*Obligation to record evidence of witnesses.*—If a person is before the Court as a witness his evidence must be recorded as the law directs; if he is not a witness, and is not examined as such, the Judge has no right to allude to his having made any statement. QUEEN *v.* PHOOLCHAND *alias* PHOLEEL AHIR . . . . 8 W. R., Cr., 11

70. ——— *Note of deposition.—Criminal Procedure Code, 1861, s. 195.*—A separate note of each witness's deposition was required to be taken by section 195 of the Code of Criminal Procedure, 1861, which was not satisfied by a statement that a witness "deposes as last witness." REG. *v.* BYHA VALAD SURJIM . . . 1 Bom., 91

71. ——— Mode of examination.—*Examination in absence of accused.*—It is illegal to examine the witnesses for the defence and to pass sentence in the absence of the accused. BIHOORAM *v.* ALLAHO KOLITA . . 1 B. L. R., S. N., 8
QUEEN *v.* RAMNATH . . 7 W. R., Cr., 45

72. ——— *Examination in absence of accused.*—Where witnesses are not examined in the presence of the accused, the conviction will be quashed. QUEEN *v.* LALLA CHOWBEY [2 N. W., 49
QUEEN *v.* RAMNATH . . 7 W. R., Cr., 45
ANONYMOUS . . . . 3 Mad., Ap., 34
QUEEN *v.* RAJCOOMAR SINGH . 8 W. R., Cr., 17
QUEEN *v.* RAMDHUN SINGH . 11 W. R., Cr., 22
QUEEN *v.* RAM DASS BOISTUB [11 W. R., Cr., 35
QUEEN *v.* RUSSICK DOSS . . 24 W. R., Cr., 70
ALI MEAH *v.* MAGISTRATE OF CHITTAGONG [25 W. R., Cr., 14

73. ——— *Evidence not taken in presence of accused.—Criminal Procedure Code, 1861, s. 194.*—When the accused has been arrested, the evidence of a witness for the prosecution ought, under section 194 of the Code of Criminal Procedure, to be taken in the presence of the accused. QUEEN *v.* HOSSAIN ALI CHOWDHRY [8 W. R., Cr., 74

74. ——— *Criminal Procedure Code, 1872, s. 327.—Evidence taken in absence of accused.*—Under section 327, Criminal Procedure Code, 1872, the witnesses for the prosecution should be examined in the presence of the accused when practicable, notwithstanding that their statements have been previously recorded in his absence. QUEEN *v.* BOCHA CHOWKEEDAR [22 W. R., Cr., 33

75. ——— *Evidence taken in absence of accused.—Warrant cases.*—It is not irregular in a warrant case for a Deputy Magistrate

WITNESS—CRIMINAL CASES—*continued.*

5. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

Mode of examination—*continued.*

to take the evidence of the complainant and certain witnesses on behalf of the prosecution in the absence of the accused. All that the accused has a right to expect after the charge has been framed is that the complainant and witnesses who had been examined in his presence before the charge was framed should be recalled for the purposes of cross-examination. QUEEN *v.* KASSY SINGH. QUEEN *v.* HULKOREE SINGH . . . . 21 W. R., Cr., 61

76. ——— *Depositions taken in absence of accused.—Criminal Procedure Code, 1872, s. 327.*—Section 327 of the Criminal Procedure Code, 1872, which permitted the depositions of a witness to be taken in the absence of an accused person who had absconded, did not apply to a deposition taken before that Code was passed. Where section 327 did apply, it was necessary to show that when the former deposition was taken the accused had absconded and after due pursuit could not be arrested. QUEEN *v.* ETWAREE DHAREE . 21 W. R., Cr., 12

77. ——— *Duty of committing Magistrate.—Examination on oath in absence of accused.—Statements of witnesses.*—The Magistrate to whom a complaint was made, examined certain persons on oath in the absence of the accused, merely for the purpose of ascertaining whether there was any, and what, case against the prisoners; and he did not take down in writing the statements of the persons so examined. *Held* that the Magistrate was wrong in examining the witnesses on oath in the absence of the accused, or for the purpose of finding out whether there was a case; but that, having done so, he was not bound to take down their statements in writing. IN THE MATTER OF THE PETITION OF ASGUR HOSSEIN. EMPRESS *v.* ASGUR HOSSEIN [I. L. R., 6 Calc., 774
S. C. IN RE ASGUR HOSSEIN . 8 C. L. R., 124

78. ——— *Examination of, in absence of accused.—Criminal Procedure Code, 1872, s. 327.—Power to quash commitment.*—An accused who was charged with murder not being found, the witnesses were examined under section 327 of Act X of 1872 in his absence. The accused was subsequently arrested and committed on the strength of the evidence taken in his absence. Before the Sessions Court he pleaded not guilty. *Held* that the prisoner having been put upon his trial and having pleaded, the commitment could not be quashed. *Held*, further, that if, in the course of a trial, the Sessions Judge should be of opinion that the prosecution has not laid a proper basis for the reception of evidence in the absence of the accused, his proper course is to adjourn the trial under section 264 of the Criminal Procedure Code, and then under section 351 summon such witnesses as he may deem material. *Semble*,—The mere absence of questions in the record of a prisoner's statement does not render it inadmissible. IN THE MATTER OF EMPRESS *v.* SAGAMBUR . . . . . 12 C. L. R., 120

WITNESS—CRIMINAL CASES—*continued.*

5. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

Mode of examination—*continued.*

79. ——— *Reading deposition of witness.*—In every Sessions trial, no matter how often the case has been before the Court, the witnesses must be examined *de novo* in the same manner as if the case were entirely new and the witnesses had not been examined before. To read to a witness his deposition on a former trial is not an examination of the witness in the presence of the accused. QUEEN *v.* KYAMUT W. R., 1864, Cr., 1

QUEEN *v.* AFFAZUDDEEN W. R., 1864, Cr., 13

QUEEN *v.* KANYE SHEIKH [W. R., 1864, Cr., 38

QUEEN *v.* KALUNDAR DOSS . 2 N. W., 100

See also QUEEN *v.* MOHUN BANFOR [22 W. R., Cr, 38

80. ——— *Reading depositions instead of examining witnesses de novo.*—The High Court refused to interfere when the evidence of witnesses given on a previous trial was read over and used in a subsequent trial at the express request of the prisoners, instead of the witnesses being examined *de novo* PURMESSUR SINGH *v.* SOROOP AUDHI KAREE . . . 13 W. R., Cr., 40

81. ——— *Criminal Procedure Code, 1882, s. 288.—Trial before Court of Session.—Evidence given before committing Magistrate used at trial to contradict witnesses.*—Section 288 of the Criminal Procedure Code was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the committing Magistrate's record, and to treat it as evidence before the Court itself. *Queen* v. *Amanulla, 12 B. L. R., Ap., 15,* referred to. A Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate, the whole or such portions of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they had made any such statements, and so forth. In a case in which the Sessions Court had neglected to apply the above rules, STRAIGHT, *J.*, quashed the conviction. QUEEN-EMPRESS *v.* DAN SAHAI . . . . . I. L. R., 7 All., 862

82. ——— Witness offering hearsay evidence.—*Duty of Court.*—The moment a witness commences giving evidence which is inadmissible—*e.g.*, hearsay evidence—he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the jury to reject the hearsay evidence, and to decide on the legal evidence alone. QUEEN *v.* PITTAMBUR SIRDAR . . 7 W. R., Cr., 25

QUEEN *v.* KALI CHURN GANGOOLY [7 W. R., Cr., 2

83. ——— Refreshing memory of witness.—*Ground for inspecting document to refresh memory of witness:—Right to inspect documents.*—*Per* FIELD, *J.*—The grounds upon which the opposite party is permitted to inspect a writing, and to refresh the memory of a witness, are threefold: (i) to secure the full benefit of the witness's recollection as to the whole of the facts; (ii) to check the use of improper documents; (iii) to compare his oral testimony with his written statement. *Per* FIELD, *J.*—The opposite party has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness. IN THE MATTER OF THE PETITION OF JHUBBOO MAHTON. EMPRESS *v.* JHUBBOO MAHTON [I. L. R., 8 Calc., 739

S. C. JHUBBOO MAHTON *v.* EMPRESS [12 C. L. R., 233

84. ——— *Memorandum made by police officer.—Criminal Procedure Code, 1872, s. 119.*—In giving evidence a police officer may refresh his memory by referring to documents in which he has, under, section 119 of Act X of 1872, reduced into writing statements of persons examined by him during an investigation, but the documents themselves cannot be used as evidence, and a Judge should not read such documents to a jury in order to point out discrepancies between the evidence and previous statements of the witnesses. ROGHUNI SINGH *v.* EMPRESS . I. L. R., 9 Calc., 455: 11 C. L. R., 569

85. ——— *Memorandum made by police officer.—Criminal Procedure Code (Act X of 1872), ss. 119 and 126.*—A prisoner on his trial is not entitled to insist that a memorandum made by a police officer under the provisions of section 119 of the Code of Criminal Procedure shall, in the course of the examination of such officer, be referred to by the latter for the purpose of refreshing his memory. *Reg.* v. *Uttamchand Kapurchand, 11 Bom., 123,* distinguished. IN THE MATTER OF THE PETITION OF KALI CHURN CHUNARI. EMPRESS *v.* KALI CHURN CHUNARI . . I. L. R., 8 Calc., 154

S. C. IN THE MATTER OF KALI CHURN CHUNARI [10 C. L. R., 51

86. ——— *Medical witness, Evidence of.—Experts.—Examination of medical witness examined before Magistrate.—Criminal Procedure Code, 1872, s. 323.*—The evidence of a medical man who has seen, and has made a *post-mortem* examination of the corpse of the person touching whose death the inquiry is, is admissible, firstly, to prove the nature of injuries which he observed; and, secondly, as evidence of the opinion of an expert as to the manner in which those injuries were inflicted, and as to the cause of death. A medical man who has not seen the corpse is only in a position to give evidence of his opinion as an expert. The proper mode of eliciting

WITNESS—CRIMINAL CASES—*continued.*

5. EXAMINATION OF WITNESSES—*continued.*

(*a*) GENERALLY—*continued.*

Refreshing memory of witness—*continued.*

such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempts to prove, and to ask the witness's opinion on those facts. Section 323 of Act X of 1872 did not in any way preclude the Judge at a Sessions trial from calling and examining the medical witness who had been examined before the Magistrate, and in every case in which the deposition taken by the Magistrate is essentially deficient or requires further elucidation, such witness should be called and examined by the Sessions Judge. A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence, and no facts can be taken therefrom. ROGHUNI SINGH *v.* EMPRESS

[I. L. R., 9 Calc., 455: 11 C. L. R., 569

87. ——— **Treatment by Court of witnesses for defence.**—When a prisoner makes a distinct defence, and calls witnesses to prove it, instead of dismissing the witnesses at once on their saying they know nothing in the prisoner's favour, a Judge should put a few questions to them in detail to see if there is any truth in the prisoner's statement or any part of it. QUEEN *v.* BHUGNER PUTWA

[11 W. R., Cr., 9

(*b*) EXAMINATION BY COURT.

88. ——— **Examination of witness by Judge.**—*Evidence Act, s. 138.—Duty of Court in examining witnesses.*—At a trial before a Sessions Court, the Judge, on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed. *Held* that such a course of procedure was irregular, and opposed to the provisions of section 138 of the Evidence Act It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in section 138 of the Act. NOOR BUX KAZI *v.* EMPRESS

[I. L. R., 6 Calc., 279: 7 C. L. R., 385

(*c*) CROSS-EXAMINATION.

89. ——— **Duty of Court as to allowing cross-examination.**—*Cross-examination of witnesses by accused.*—The Judge ought, if requested, to allow the accused an opportunity of cross-examining all witnesses whose depositions have been taken for the prosecution by the committing Magistrate, but whose evidence is dispensed with by the prosecutor at the trial. His refusal to do so is, however, not an error in law. REG. *v.* FATTECHAND VASTACHAND . . . . . 5 Bom., Cr., 85

WITNESS—CRIMINAL CASES—*continued.*

5. EXAMINATION OF WITNESSES—*continued.*

(*c*) CROSS-EXAMINATION—*continued.*

90. ——— **Right to cross-examine.**—*Right of accused to cross-examine witnesses.*—The right of an accused party to cross-examine witnesses is limited to a right to cross-examine the witnesses for the prosecution called against him. If he wishes to avail himself of evidence which has been given, or which can be given, by a witness called for another of the parties accused, he must call him as his own witness. QUEEN *v.* SUROOPCHUNDER PAUL

[12 W. R., Cr., 75

91. ——— *Evidence Act, s. 165.—Witness called by the Court.*—Witnesses summoned on behalf of the prosecution, and not called, ought to be placed in the box for cross-examination, in order that the defence may have the opportunity of exercising this right, and *à fortiori*, if such a witness is called and examined by the Court under section 165 of the Evidence Act, the prisoner should be allowed to cross-examine. IN THE MATTER OF EMPRESS *v.* GRISH CHUNDER TALUKDAR

[I. L. R., 5 Calc., 614: 5 C. L. R., 364

92. ——— *Hostile witness.—Evidence Act, s. 154.*—The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or to that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence. KALACHAND SIRKAR *v.* QUEEN-EMPRESS . I. L. R., 13 Calc., 53

93. ——— *Medical witness.*—As to cross-examination by accused of medical witness called in a professional capacity, *see* QUEEN *v.* ISHAN DUTT

[6 B. L. R., Ap., 88: 15 W. R., Cr., 34

94. ——— *Evidence Act (II of 1855), s. 34.—Cross-examination on previous statements reduced to writing.*—The complainant's pleader was held to be at liberty before the Deputy Magistrate to cross-examine the witnesses for the defence on points respecting which they had made statements before the Joint Magistrate, and he might do so as regards previous statements which were reduced to writing, without showing the writing. Section 34, Act II of 1855, explained. TUKHEYA RAI *v.* TUPSEE KOER . . . . . 15 W. R., Cr., 23

95. ——— *Evidence Act, 1855, s. 23.—Cross-examination on previous statements reduced to writing.*—A witness when under examination-in-chief before the Court of Sessions should not have his attention directed to his deposition before the Magistrate. He might, under section 23, Act II of 1855, be cross-examined as to previous statements made by him in writing, when his attention might be drawn to the parts of the former writing which were to be used for the purpose of contradicting him. QUEEN *v.* RAMCHUNDER SIRCAR

[13 W. R., Cr., 18

WITNESS—CRIMINAL CASES—*continued.*

5. EXAMINATION OF WITNESSES—*continued.*

(*c*) CROSS-EXAMINATION—*continued.*

96. ——— Right of witness on cross-examination.—*Right to qualify statements.*—A witness ought to be allowed on cross-examination to qualify or correct any statement which he has made in his examination-in-chief. QUEEN *v.* TULSI DOSADH . . . . . **18 W. R., Cr., 57**

97. ——— Right to recall witnesses for cross-examination.—*Cross-examination of, by accused.*—*Witnesses for defence.*—*Record of evidence.*—The charge having been read to the accused person, he stated his defence to the same, upon which the Magistrate, the witnesses for the prosecution being in attendance, called upon the accused to cross-examine them. The accused refused to do so until he had examined the witnesses for the defence who were not in attendance. The Magistrate then discharged the witnesses for the prosecution and adjourned the trial for the production of the witnesses for the defence. *Held per* SPANKIE, *J.*, that the accused was not entitled to have the witnesses for the prosecution summoned, in order that they might be cross-examined by the accused on the date fixed for the examination of the witnesses for the defence. *Held*, also, *per* SPANKIE, *J.*, that the Magistrate was empowered to record both oral and documentary evidence after the witnesses for the defence had been examined. EMPRESS OF INDIA *v.* BALDEO SAHAI **[I. L. R., 2 All., 253**

98. ——— Cross-examination after reading depositions.—*Irregularity in examination.*—*Criminal Procedure Code, ss. 286, 288.*—At a trial before a Sessions Court, the attorney who appeared for the prisoner suggested to the Court that, to expedite the trial, certain depositions of witnesses for the prosecution, taken before the Magistrate, should be read, and that he should be allowed to cross-examine the witnesses thereupon: to this course the Government Prosecutor and the Court consented. *Held* that this procedure was illegal, but that, inasmuch as it had not occasioned a failure of justice, a new trial should not be granted. SUBBA *v.* QUEEN-EMPRESS . **I. L. R., 9 Mad., 83**

99. ——— Cross-examination of witness after his examination by the Court.—*Evidence Act (I of 1872), s. 155.*—The principle that parties cannot, without the leave of the Court, cross-examine a witness whom, the parties having already examined or declined to examine, the Court itself has examined, applies equally whether it is intended to direct the cross-examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit tends (or is designed) to get rid of the effect of each and every answer, just as much as one that may bring out an inconsistency or contradiction, section 155 of Act I of 1872. REG. *v.* SAKHARAM MUKUNDJI . . . . . **11 Bom., 166**

10. ——— Recalling witnesses for cross-examination.—*Refusal to recall witness.*—

WITNESS—CRIMINAL CASES—*continued.*

5. EXAMINATION OF WITNESSES—*continued.*

(*c*) CROSS-EXAMINATION—*continued.*

Recalling witnesses for cross-examination—*continued.*

When the charge had been framed and the defendant put on his defence, he had a right, under section 218 of the Criminal Procedure Code, 1872, to have the prosecutor's witnesses recalled for the purpose of cross-examination. The claim to recall the witnesses for the prosecution was very different from the request made by the accused person to summon a witness under section 362, Act X of 1872. IN THE MATTER OF THE PETITION OF BELILIOS. BELILIOS *v.* QUEEN ON THE PROSECUTION OF KALI DOSS BANERJEE **[19 W. R., Cr., 53**

101. ——— *Criminal Procedure Code, 1861, s. 252.*—A Magistrate could not refuse to allow witnesses whom he allowed to be cross-examined by the accused previous to the preparation of a charge to be recalled and cross-examined after the accused had been put upon his defence, under section 252 of the Code of Criminal Procedure, treating them as witnesses for the prosecution. IN THE MATTER OF THAKOOR DYAL SEN **[17 W. R., Cr., 51**

IN THE MATTER OF THE PETITION OF NOBIN CHAND BANERJEE . **25 W. R., Cr., 32**

102. ——— *Warrant cases.*—*Criminal Procedure Code, 1872, Ch. XVII.*—In the trial of warrant cases the accused may, after the charge is drawn up and the witnesses for the defence have been examined, recall and cross-examine the witnesses for the prosecution. TALLURI VENKAYYA *v.* QUEEN . . . **I. L. R., 4 Mad., 130**

103. ——— *Right of accused to cross-examine witness.*—*Criminal Procedure Code, 1872, s. 218.*—An accused person had, under section 218 of Act X of 1872, the right to recall and cross-examine the witnesses for the prosecution at any time while he was engaged on his defence and before his trial was concluded. He is not precluded from asserting and exercising the right, by reason of his having cross-examined them before he was put on his defence, or by reason of his not having, *suo motu*, expressed his wish to do so at the time he was called upon to enter on his defence, and when the witnesses were in attendance in the Court and did not require to be re-summoned. QUEEN *v.* LALL SINGH **[6 N. W., 270**

104. ——— *Criminal Procedure Code, 1872, s. 218.*—*Recall of witnesses for prosecution.*—Under section 218 of the Code of Criminal Procedure, a Magistrate is not competent to refuse to recall the witnesses for the prosecution to be cross-examined by the accused, and it is not necessary for the accused to show that he has reasonable grounds for his application. QUEEN *v.* AMIRUDDIN FAKEER . . . . **21 W. R., Cr., 29**

WITNESS—CRIMINAL CASES—*continued.*

5. EXAMINATION OF WITNESSES—*continued.*

(c) CROSS-EXAMINATION—*continued.*

Recalling witnesses for cross-examination—*continued.*

105. ——— *Cross-examination previous to framing of charge.—Criminal Procedure Code, 1872, s. 218.*—An accused person was held to be not deprived of the right given him by section 218, Act X of 1872, to recall and cross-examine the witnesses for the prosecution after the charge had been drawn up against him, by reason of the witnesses having been cross-examined before the charge was framed. A Magistrate should not of his own motion discharge the witnesses for the prosecution until the accused person has exercised or waived the right of cross-examination given him by the section. When it becomes necessary to adjourn the hearing the Magistrate should in all cases enquire of the accused if he desires to exercise his right of recalling the witnesses for the prosecution, or consents to the discharge of all or any of them. If the accused consents to their discharge, and they are discharged accordingly, he is not entitled to have them re-summoned as a matter of right. Where it became necessary to adjourn the hearing, and the Magistrate did not call upon the accused to exercise his right under the section, and there was no sufficient proof that the accused consented to the discharge of the witnesses for the prosecution, it was held that the accused was entitled to have the witnesses, whom he desired to cross-examine at the further hearing, re-summoned. *Quere.*—If the Magistrate before granting an adjournment called upon the accused to exercise his right of recalling the witnesses for the prosecution, and the accused refused to do so at that time, whether the Magistrate would thereupon be at liberty to discharge the witnesses. QUEEN *v.* LALL MAHOMED . . . . . 6 N. W., 284

106. ——— *Right of accused to cross-examine witnesses.—Examination of accused.—Discretion of Magistrate.*—An accused should be allowed, at preliminary inquiries before a Magistrate, to cross-examine the witnesses; but whether the accused himself shall be examined upon the matter of the charge by the Magistrate is left entirely to the discretion of the Magistrate and such discretion should not be exercised when the Magistrate thinks that the evidence for the prosecution does not disclose any proper subject of criminal charge against the prisoner. QUEEN *v.* SHAMA SUNKUR BISWAS . . . 10 W. R., Cr., 25

107. ——— *Right of accused to recall witnesses for prosecution.—Criminal Procedure Code (Act X of 1872), ss. 217, 218.*—Reading sections 217 and 218 of the Criminal Procedure Code together, it appears that, if an accused person desires to recall and cross-examine the witnesses for the prosecution, the time at which he should express such desire is when the charge is read over to him and he is called upon to make his defence; and although it is in the discretion of the Magistrate to recall the witnesses at a subsequent stage of the case, the accused has no right to insist upon the witnesses being recalled. FAIZ ALI *v.* KOROMDI [I. L. R., 7 Calc., 28

S. C. IN THE MATTER OF FAIZ ALI [8 C. L. R., 325

108. ——— *Cross-examination of witnesses for the prosecution.*—As a rule the proper and convenient time for the purpose of cross-examination of the witnesses for the prosecution is at the commencement of the accused person's defence; but it is in the discretion of the Criminal Court to allow the accused to recall and cross-examine the witnesses for the prosecution at any period of the defence when the Court may think such a step right and proper. KHUBRUCKDHAREE SINGH *v.* PERSHADEE MUNDUL . . . . [22 W. R., Cr., 44

109. ——— *Refusal to allow accused to recall witnesses for prosecution.—Waiver of right by accused.*—Where certain accused persons, who were convicted of using criminal force, had not been allowed to recall and cross-examine the witnesses for the prosecution, because the trying officer believed that such witnesses could only be recalled immediately after the framing of the charge,—*Held* that accused persons always had a right to recall prosecution witnesses, which ceased only when they themselves waived it; that Magistrates could waive all inconvenience to witnesses by asking accused persons, on the drawing up of charges, whether they required the further attendance of the witnesses; and that the conviction must be set aside because the accused had not enjoyed the protection provided by the law. QUEEN *v.* RAM KISHAN HALWAI [25 W. R., Cr., 48

6. CONSIDERATION AND WEIGHT OF EVIDENCE.

110. ——— Weight of evidence.—*Single witness.—Evidence of fact.*—The evidence of one witness, if reliable, is sufficient to prove a fact. ZALEM MISSER *v.* KUNDUN KOOER [11 W. R., 194

BALINDUR NARAIN *v.* KALLA MESSOO KOOS [18 W. R., 341

PROSONNO NARAIN DEB *v.* ROMONEE DOSSEE [10 W. R., 236

111. ——— Discrepancies in evidence of witnesses.—*Effect of discrepancies.*—Discrepancies in the evidence of witnesses are not the less destructive of their testimony because a greater sagacity on the part of the witnesses would have avoided them. REG. *v.* KALU PATIL . . 11 Bom., 146

112. ——— Consideration of evidence.—*Assumption of bad character of prisoner.*—A Judge cannot properly weigh evidence which starts

WITNESS—CRIMINAL CASES—*continued.*

6. CONSIDERATION AND WEIGHT OF EVIDENCE—*continued.*

Consideration of evidence—*continued.*

with an assumption of the general bad character of the prisoners. QUEEN *v.* KALU MAL
[7 W. R., Cr., 103

113. ——— Value of evidence.—*Value of evidence of medical witness.*—In trying a prisoner charged with giving false evidence, a Sessions Judge rejected facts which were proved by the evidence of certain witnesses, because a medical officer gave it as his opinion that what the witnesses deposed to could not be true. *Held* that it was not the proper way to try a case to rely on mere theories of medical men or skilled witnesses of any sort against facts positively proved. QUEEN *v.* AHMED ALLY
[11 W. R., Cr., 25

WORKMAN.

See ACT XIII OF 1859.
[2 B. L. R., A. Cr., 32
I. L. R., 7 Mad., 100
I. L. R., 10 Bom., 96
I. L. R., 7 Bom., 379

WRITTEN STATEMENT.

See ADMISSION — ADMISSIONS IN STATEMENTS AND PLEADINGS.
[B. L. R., Sup. Vol., 904
1 B. L. R., A. C., 133
9 W. R., 83, 130, 290
22 W. R., 220
16 W. R., 257

See FALSE EVIDENCE—GENERALLY.
[I. L. R., 6 All., 626

1. ——— Form and contents of written statement.—*Civil Procedure Code, 1859, s. 123.—Defendant's written statement.—Variance between pleading and proof.*—Section 123 of the Civil Procedure Code contemplated that a defendant should, in his written statement, set forth the case he intends to make at the trial. The rule followed in *Eshenchunder Singh* v. *Shamachurn Bhutto, 11 Moore's I. A., 7; Mohummud Zahoor Ali Khan* v. *Rutta Koer, 11 Moore's I. A., 468;* and *Narainee Dossee* v. *Nurtohurry Mohuto, Marsh., 70,* that a plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith, applies also to the case made on the pleadings by a defendant. Therefore, where the defendant in a suit in ejectment averred in his written statement that the land in dispute was in fact his, but had previously to 1865 been encroached on by the plaintiff, who, in 1865, was about to erect a building thereon, and that the defendant then, in order to avoid litigation, compromised the dispute by payment to the plaintiff of a sum of money, and purchased the land, and had since then remained in possession of it,—*Held* that the only defence open to the defendant was that of purchase, and that he could not be allowed at the trial to prove a case of continuous user and possession adverse to the plaintiff commencing before 1865. CHOVA KARA *v.* ISA-BIN KHALIFA
[I. L. R., 1 Bom., 209

WRITTEN STATEMENT.—**Form and contents of written statement**—*continued.*

2. ——— *Argumentative statement.*—A written statement should not be argumentative. BISHEN SAHAYE SINGH *v.* BEER KISHORE SINGH . . . . 8 W. R., 296

3. ——— *Offer without prejudice.—Irrelevant matter.—Act VIII of 1859, s. 124.*—An offer without prejudice should be omitted from the pleadings. In a suit where the written statement of the plaintiff contained letters relative to an offer made by the defendants without prejudice, the Court ordered, on the application of the defendant, that the paragraphs of the written statement relating to the offer should be struck out. HALFORD *v.* EAST INDIAN RAILWAY COMPANY
[12 B. L. R., Ap., 19

4. ——— *Irrelevant matter.—Application to take written statement off the file.*—Where there was in a written statement matter irrelevant and improper, the Court, on application, ordered it to be taken off the file, with leave to file a fresh one in a week. Written statements should set out the *bonâ fide* nature of the defence, and nothing else. KASUBLAL DEY *v.* TREMEARNE
[3 B. L. R., Ap., 12

5. ——— *Taking off the file for irrelevancy.—Relevant matter.—Tender of written statement.*—The Court has jurisdiction to take a written statement off the file, for irrelevancy, until it is "tendered," which is when it is produced at the hearing of the suit. "Relevancy" is to be judged by what the defendant believed to be material to his case, and not whether it did in fact disclose a good defence to the action. KESHAVJI NAIK *v.* NASARVANJI ARDESIR WADIA . 10 Bom., 425

6. ——— Court fee on written statement.—*Code of Civil Procedure (Act VIII of 1859), s. 120.—Act X of 1877, s. 110.—Court Fees Act (VII of 1870), s. 19.*—A written statement of his case, tendered by a party to a suit at any time before or at the first hearing of the suit, is not liable to any court fee, and may be written on plain paper (section 110 of Act X of 1877). A written statement called for by the Court after the first hearing, is also exempt from stamp duty (section 19 of Act VII of 1870). NAGU *v.* YEKNATH
[I. L. R., 5 Bom., 400

CHERAG ALI *v.* KADIR MAHOMED
[12 C. L. R., 367

7. ——— Verification of written statement.—*Admission on record without verification.*—A written statement filed by the defendant should be verified, but if admitted on the record without verification its allegations should be noticed and issues framed accordingly. RADHACHURN ROY *v.* MORAN & CO. . . . . 13 W. R., 342

WRITTEN STATEMENT.—Verification of written statement—*continued.*

8. ——— *Application to verify.—Notice.—Practice.*—Where an application is made that a written statement be verified by a person other than the plaintiff or defendant, it is always desirable that notice be given to the other side, although not absolutely necessary. FINLAY, CAMPBELL, & CO., *v.* STEELE [1 Ind. Jur., N. S., 39

9. ——— *Application to verify by agent.—Notice.*—The Court will allow a written statement to be verified by the constituted attorney of the party without notice to the other side. OVERNED, GURNEY, & CO., *v.* STEELE [1 Ind. Jur., N. S., 40

10. ——— Filing written statement.—*Time for filing.*—Under the Code of Civil Procedure a plaintiff cannot file a written statement after having seen that of the defendants, and by way of rejoinder thereto. JADUB RAM DEB *alias* JADUB CHUNDER DEB *v.* RAM LOCHUN MUDUCK [5 W. R., 56

11. ——— *Filing and verifying written statement on behalf of plaintiff.—Civil Procedure Code, 1859, ss. 28, 123.*—The plaintiff in a suit went on a pilgrimage after he had been ordered to file a written statement, but without having filed it. Not having returned when the case was on the board, his son applied, under sections 28 and 123 of Act VIII of 1859, for leave to verify and file a statement, alleging himself to be interested as a reversioner. The application was refused. *Held* that a third party will not be allowed to verify and file a written statement for a plaintiff who has culpably neglected to file one himself. DENOMOYE DOSSEE *v.* TARRACHURN COONDOO CHOWDHRY [Bourke, O. C., 153

12. ——— Admission of written statements.—*Civil Procedure Code, 1859, ss. 120, 122.*—The admission of written statements of the parties on various dates, unless expressly called for by the Court, was held to be contrary to the provisions of sections 120 and 122 of the Civil Procedure Code, 1859. ALI NUKEE *alias* EMDAD ALI *v.* TORAB ALI *alias* MIRZA NAWAB . W. R., 1864, 44

13. ——— Written statement by third party.—*Power of Court.*—A Court has no authority to receive a written statement in a suit from one who is not a party, or to permit such a person to appear at the hearing. SURNOMOYEE *v.* BYKUNT CHUNDER MUSTOFEE . . . . 25 W. R., 17

14. ——— Defendant neglecting to put in statement.—*Adjournment of case.—Costs.*—In the event of a defendant neglecting to furnish a written statement, the Court will examine him as to the grounds of his defence; and should it appear desirable that a written statement should be put in, the case will be adjourned for that purpose at the expense of the defaulting party. RAMRUTTON *v.* ORIENTAL INLAND STEAM NAVIGATION COMPANY [2 Hyde, 89

WRITTEN STATEMENT—*continued.*

15. ——— Additional written statement.—*Practice.—Act VIII of 1859, s. 122.*—An application by the defendant for leave to file an additional written statement allowed on condition of the defendant paying the whole costs and furnishing a copy of the additional statement to the plaintiff free of charge. Distinction made between such an application by a plaintiff and one made by a defendant. DASMANI DASI *v.* SRINATH GHOSE [3 B. L. R., Ap., 11

16. ——— *Supplemental statements, Filing of.*—Supplemental written statements cannot be filed after the parties have entered upon their case at the hearing. MUNCHERSHAW BEZONJI *v.* NEW DHURUMSEY SPINNING & WEAVING COMPANY . . . . I. L. R., 4 Bom., 576

17. ——— *Civil Procedure Code, 1859, s. 122.*—A Court was held not to have done wrong in admitting a supplemental written statement which it had called for under section 122, Civil Procedure Code, 1859, which did not add to or vary the plaintiff's claim. JAHANGEER BUKSH *v.* BHICKABEE LALL . . . . 11 W. R., 71

18. ——— *Statement explaining plaint.*—A written statement which was in explanation of the plaint and not starting a new case was allowed to be put in by the plaintiff after evidence was taken, and the defendant not being prejudiced by its admission. LALL MAHOMED *v.* DHOOLEE RAM DOSS . . 22 W. R., 377

19. ——— Objections to written statement.—*Sunday.—"Four clear days."—Civil Procedure Code, 1859, s. 124.*—A written statement has been "four clear days" upon the file in compliance with the rule 28, although the last of such days is a Sunday. Objections to the written statement on the ground stated in section 124 of Act VIII of 1859 cannot be taken when the suit is ripe for hearing. SMALLWOOD *v.* PARRY . . . Cor., 39

20. ——— Raising question not raised in written statement.—*Omission to raise equitable defence in written statement.*—A defendant is not precluded from availing himself of any equity which might arise out of the facts proved at the trial, merely because he has not raised that equity on the face of his written statement. GOUR CHUNDER BISWAS *v.* GREESH CHUNDER BISWAS [7 W. R., 120

21. ——— *Raising question of jurisdiction.—Fresh issue.—Practice.*—Where a question of jurisdiction had not been raised in a written statement, the defence therein being limited to a statement of the merits of the case, an application to raise an issue as to jurisdiction was granted on payment of the costs of the adjournment to enable the plaintiff to meet the case set up. ROHEEMOLLA *v.* PALMER . . . Cor., 8

WRONGFUL CONFINEMENT.

1. ——— What amounts to imprisonment.—*Suit for damages.*—The detaining of a

WRONGFUL CONFINEMENT.—What amounts to imprisonment—*continued.*

person in a particular place, or the compelling him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of the person exercising that exterior will. PARAN KUṢAM NARASAYA PANTULU *v.* STUART [2 Mad., 396

2. ——— **Nature of confinement.**—*Penal Code (Act XLV of 1860), s. 346.*—In an order to render a person liable under section 346 of the Penal Code, it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered. IN THE MATTER OF THE PETITION OF SREENATH BANERJEE. EMPRESS *v.* SREENATH BANERJEE . . . . I. L. R., 9 Calc., 221

3. ——— **Unlawful commitment by person in authority.**—*Illegal arrest.—Penal Code, s. 220.—Presumption of malice.*—Proof of an unlawful commitment to confinement will not of itself warrant the legal inference of malice. Knowledge that such commitment is contrary to law is a question of fact and not of law, and must be proved in order to satisfy the requirements of section 220 of the Penal Code. REG. *v.* NARAYAN BABAJI [9 Bom., 346

4. ——— **Obtaining arrest of wrong person.**—*Liability of person setting Court in motion.*—Where a wrong person is arrested and imprisoned under a decree to which he is no party, the person setting the Court in motion is not liable for such arrest and imprisonment if he did not obtain the process fraudulently or improperly. BHEEMA CHARLU *v.* DONTI MURTI . . 8 Mad., 38

5. ——— **Illegal arrest.**—*Malice.*—Four persons, two of them police constables and two village officers, were convicted of wrongful confinement and abetment thereof. The defendants, the village officers, maliciously directed the arrest of certain persons for resisting the detention of certain pigs found trespassing. *Held*, a good conviction. ANONYMOUS . . . . 5 Mad., Ap., 24

WRONGFUL CONVERSION.

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS.
[I. L. R., 4 Calc., 116
5 Bom., O. C., 140

See ONUS PROBANDI—WRONGFUL CONVERSION . . . 7 W. R., 286

WRONGFUL DISMISSAL.

See CASES UNDER MASTER AND SERVANT.

——— **Suit for, against Government.**

See MASTER AND SERVANT.
[7 B. L. R., 688

WRONGFUL DETENTION.

——— *Detention of accused by Police Inspector.—Criminal Procedure Code, 1872, s. 124.*—*Per* GLOVER, *J.*—Where a Sub-Inspector of Police is charged with having detained prisoners for more than twenty-four hours, it is not necessary for the Crown to prove that he detained them with a guilty knowledge, as section 124, Act X of 1872, imperatively lays down that accused persons are on no account to be detained beyond that time except under special order of the Magistrate, which was not obtained in this case. QUEEN *v.* BASOORAM DASS [19 W. R., Cr., 36

WRONGFUL DETENTION—*continued.*

WRONGFUL DISTRAINT.

See BENGAL RENT ACT, VIII OF 1869, S. 27.
[3 B. L. R., Ap., 74
6 W. R., Act X, 7, 33
9 W. R., 162
Marsh., 264
15 W. R., 451
3 B. L. R., A. C., 261
7 W. R., 41

See BENGAL RENT ACT, VIII OF 1869, S. 100.
[Marsh., 470
3 W. R., Act X, 139

See PRIVATE DEFENCE, RIGHT OF—
[23 W. R., Cr., 40

See RIOTING . . 8 Mad., Ap., 11

See TRESPASS—GENERAL CASES.
[23 W. R., Cr., 40

1. ——— **Cutting and carrying away crops.**—*Persons put in possession in execution of decree.*—Certain putnidars who, in execution of a decree for khas possession, had been put in nominal possession of their lands, instead of ousting the ryots allowed them to cultivate, and when they had cultivated cut and carried away their crops. *Held* that the act of the putnidars was an abuse of the law of distraint, and rendered them liable for damages. ADOR MOHUN CHUCKERBUTTY *v.* THAKOOR MONEE DABEE . . . . . 10 W. R., 70

2. ——— **Crops, Seizure of.**—*Act X of 1859, ss. 142 and 143.—Trespass.*—Certain sublessees sued in the Collector's Court the zemindar and others employed by him for the value of crops seized and carried away, under a certificate, as was alleged by the defendants, granted to them by the Collector, but which they failed to produce. *Held* that sections 142 and 143 of Act X of 1859 applied to the case. Section 143, Act X of 1859, contemplated not only the case of a person who professes to follow the provisions of the law, though he has no power to distrain, but also the case of a person who, under colour of the Act, does distrain, but does not do so according to the provisions of the Act. Such persons were considered by that section as trespassers, and were liable to the penalty of trespass, in addition to damages which may be awarded against them by the Revenue Court. RADHA MOHAN NASKAR *v.* JADUNATH DASS [3 B. L. R., A. C., 261: 12 W. R., 68

3. ——— **Person acting without authority.**—*Act X of 1859, s. 143.—Trespasser.*—Section 143, Act X of 1859, did not apply when a

WRONGFUL DISTRAINT.—Person acting without authority—*continued.*

distrainer acted without the authority of the superior holder. In such a case he was a mere trespasser. ROWSHUN *v.* BHOLANATH DOSS [5 W. R., Act X, 67

4. ——— Persons removing property under rent law.—*Procedure.—Penal Code, s. 379.*—Persons removing property under the provisions of the rent law relating to distraint ought not to be proceeded against under the criminal law, but the parties aggrieved by a wrongful distraint should have recourse to the remedy provided by Bengal Act VIII of 1869. IN THE MATTER OF AGHANI. AGHANI *v.* BHAGI HALWAI [8 C. L. R., 204

5. ——— Right to sue to set aside wrongful distraint.—*Right of landlord against trespasser.*—A landlord whose tenant's crops have been wrongfully distrained by a stranger, has a right to sue to set aside such wrongful distraint. HORBO NARAIN *v.* SHOODHA KRISHTO BERAH [I. L. R., 4 Calc., 890 : 4 C. L. R., 32

6. ——— Right to damages for wrongful distraint.—*Beng. Act VIII of 1869, ss. 69, 78.—Liability to suit for damages.*—When on the one hand a ryot institutes a suit to contest the demand of a distrainer, the Court has no option but must adjudicate upon the demand. If, on the other hand, the distrainer has distrained "otherwise than according to the provisions of the Rent Act," he has done so at his peril, and rendered himself liable to an action for damages by the owner of the distrained property. TARINEE KANT LAHIREE CHOWDHRY *v.* RAJKISHORE TONTRY . . . 24 W. R., 334

7. ——— Right to damages.—*Act X of 1859, s. 142.—Suit to contest distraint.—Onus of proof.—Damages.*—In a suit to contest the demand of a distrainer, the landlord is only required to prove the fact of tenancy and the amount of jumma: if thereupon the tenant pleads payment and payment is denied, the onus is on the tenant to prove his allegation. Before a tenant can obtain any decree for damages on the ground of illegal distraint, he must prove what loss he has actually sustained. OOJAN DEWAN *v.* PRANNATH MUNDUL . . 8 W. R., 220

8. ——— Onus of proof.—*Suit for damages for wrongful distraint.—Act X of 1859, s. 143.*—In order to maintain a suit under section 143, Act X of 1859, it was necessary for the plaintiff to prove that the defendant in making the distress was acting not only without right, but without anything to justify him in supposing that he had a right to distrain—a mere trespasser without any reasonable foundation for the claim set up. RAYE KUMUL DOSSEE *v.* JHOROO MOLLAH . . . 15 W. R., 543

See JOYLOLL SHEIKH *v.* BROJONATH PAUL CHOWDHRY. . . . . 9 W. R., 162

9. ——— Suit on account of property damaged by wrongful distrainer.—*Act X of 1859, s. 142.—Damages for vexatious distraint, Power of Court to award.*—When a suit had been

WRONGFUL DISTRAINT.—Suit on account of property damaged by wrongful distrainer—*continued.*

brought under section 142, Act X of 1859, on account of property damaged or destroyed by neglect of a distrainer, the Court was not competent to award damages for vexatious distraint. Such damages were properly awarded by the Collector under section 138, in a suit to contest the distrainer's demand. NONKOO RAM *v.* WOOJOGUR ROY . 5 W. R., Act X, 68

10. ——— Procedure.—*Beng. Act VIII of 1869, s. 101.—Proceedings against persons wrongfully distraining.*—When proceedings are taken before a Munsif, under Bengal Act VIII of 1869, section 101, he is bound, first, to inquire whether an offence has been committed, and if he is satisfied that it has, the only order he can make against the offenders (not being tenants) is that they shall pay the value of the crops distrained. PREM CHAND LAHA *v.* ADDOITO DOSS . . 20 W. R., 445

WRONGFUL LOSS.

See MISCHIEF . I. L. R., 3 Calc., 573
[I. L. R., 12 Calc., 660

WRONGFUL POSSESSION.

——— Trespasser.—*Sums paid during wrongful possession, Right to recover.*—Where a person has wrongfully taken possession of an estate and held it adversely to the true owner, and has, during his possession, paid certain sums for Government revenue on the supposition that he was the lawful owner (being however, in reality, nothing more than a trespasser and wrong-doer), he is not entitled to recover, as against the true owner, any sums so paid, even though such payments may have enured to the benefit of the true owner, but must be content to bear the burden of his own wrong. TILUCK CHAND *v.* SOUDAMINI DASI [I. L. R., 4 Calc., 566 : 3 C. L. R., 456

WRONGFUL SEIZURE IN EXECUTION.

See CIVIL PROCEDURE CODE, 1882, S. 244 (ACT XXIII OF 1861, S. 11)—QUESTIONS IN EXECUTION OF DECREE.
[3 N. W., 187
2 Agra, 105
5 Mad., 185
12 B. L. R., 201, 208, note; 207, note; 208, note
12 W. R., 85
3 B. L. R., A. C., 413

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS . 3 Agra, 202
[3 B. L. R., A. C., 413
I. L. R., 3 Bom., 74
7 Mad., 235

See EXECUTION OF DECREE—LIABILITY FOR WRONGFUL EXECUTION.
[3 B. L. R., A. C., 413
12 B. L. R., 208, note
I. L. R., 3 Bom., 74

WRONGFUL SEIZURE IN EXECUTION—*continued.*

See CASES UNDER SALE IN EXECUTION OF DECREE—WRONGFUL SALES.

WRONGFUL RESTRAINT.

See MISCHIEF . I. L. R., 12 Calc., 55

1. ——— **Penal Code, ss. 339, 340, 342.**—*Police officer, Conduct of.*—In a case of a police officer charged under Penal Code, section 342, where there was no malice, no intention of doing an act of the nature spoken of in section 339 or 340, and no voluntary obstruction or restraint, though there was probably excessive and mistaken exercise of powers not civilly excusable in a police officer, the facts were held not to amount to the criminal offence of wrongful restraint. IN THE MATTER OF THE PETITION OF BUDROOL HOSSEIN . . 24 W. R., Cr., 51

2. ——— **s. 339.**—*Refusal to let person go until he gave bail.*—Where a police officer refused to let a person go home until he had given bail, he was held to have been guilty of wrongful restraint under section 339 of the Penal Code. SHEO SHURN SAHAI *v.* MAHOMED FAZIL KHAN [10 W. R., Cr., 20

3. ——— *Restraint and taking money on false plea.*—Where the accused prevented the complainants from proceeding in a certain direction with their carts and exacted from them a sum of money on a false plea,—*Held*, the accused were guilty of wrongful restraint and not theft. JOWAHIR SHAH *v.* GRIDHAREE CHOWDHRY [10 W. R., Cr., 35

Y

YEAR, AGRICULTURAL—

See N.-W. P. RENT ACT (ACT XVIII OF 1873), S. 94 . I. L. R., 1 All., 512

Z

ZANZIBAR.

See CONSUL'S COURT AT ZANZIBAR. [I. L. R., 3 Bom., 58

ZEMINDAR.

See GRANT—CONSTRUCTION OF GRANTS. [I. L. R., 9 Mad., 307
L. R., 13 I. A., 32

See GRANT—POWER TO GRANT. [B. L. R., Sup. Vol., 75, 774

——— **Duty of.**—*Ancient tanks.—Negligence.—Statutory powers.—Liability for damage occasioned by overflow of tanks.*—The public duty of maintaining ancient tanks, and of constructing new ones, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved upon zemindars. Such zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. The rights and liabilities of such zemindars with regard to these tanks are analogous to those of persons or corporations on whom statutory powers have been conferred, and statutory duties imposed. A zemindar, if the banks of any such tank in his possession are washed away by an extraordinary flood without negligence on his part, is not liable for damage occasioned thereby. MADRAS RAILWAY COMPANY *v.* ZEMINDAR OF CARVETINAGARAM [14 B. L. R., 209 : 22 W. R., 279
L. R., 1 I. A., 364

S. C. in lower Courts. MADRAS RAILWAY COMPANY *v.* ZEMINDAR OF KAVETINUGGUR. [5 Mad., 139
and after remand . . . 6 Mad., 180

——— **Kabuliat between Government and—**

See SPECIFIC PERFORMANCE — SPECIFIC PERFORMANCE NOT ALLOWED. [I. L. R., 3 Calc., 464

ZEMINDAR, POWER OF—

1. ——— **Power to grant lease.**—*Lease granted for longer term than zemindar's engagement with Government.—Operation of Act XVI of 1842.*—A lease granted by a zemindar for a longer period than the term of his own engagement with the Government was not absolutely void for the excess, but only voidable, and might be confirmed. *Semble*,—that Act XVI of 1842 applied to agricultural leases, not to *bonâ fide* leases for other purposes. NITA RAM *v.* NANUCK DASS [1 N. W., Part III, 47 : Ed. 1873, 103

2. ——— *Hindu law.—Authority to grant leases as manager and owner.*—Under the Hindu law the granting of a lease, though for a term, is an act within the scope of a zemindar's authority as manager and owner of the zemindari, and is, as such, binding on his successor, unless, in the circumstances in which it was made, it was otherwise than *bonâ fide*. RAMANADAN *v.* SRINIVASA MURTHI . . I. L. R., 2 Mad., 80

3. ——— **Power to alter boundaries.**—*Effect of arrangement altering boundary without sanction of Government.*—Zemindars have no authority, without the sanction of Government, to alter the boundaries of their permanently-settled estates, and to transfer villages from one zemindari to another. Such an arrangement is of no binding effect, except between the parties who have made it. RAMCHUNDER BANERJEE *v.* MUDDUNMOHUN TEWAREE . . . . W. R., 1864, 355

4. ——— **Power to charge estate with personal debts.**—A decree for possession of certain land with wasilat obtained by a zemindar of an estate, as such, cannot be pledged by him as security for a

ZEMINDAR, POWER OF.—Power to charge estate with personal debts—*continued.*

personal debt, nor for such a debt can the estate be made liable, nor his successor be held responsible. NIMAYE CHURN SEIN *v.* RAMMONEE BEEBEE
[10 W. R., 152

ZEMINDAR, RIGHTS OF—

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.
[I. L. R., 1 All., 338

See MADRAS REGULATION XXV OF 1802.
[14 B. L. R., 115

See MEASUREMENT OF LANDS.
[3 B. L. R., Ap., 27

See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT . . I. L. R., 3 Calc., 774

1. ——— **Nature of zemindari estate.**—*Power to deal with estate.*—A zemindar's estate is analogous to an estate-tail as it originally stood upon the statute *de donis*. The zemindar is the owner of the zemindari, but can neither encumber nor alienate beyond the period of his own life. CHINTALAPATI CHINNA SIMHADRIRAJ *v.* ZEMINDAR OF VIZIANAGRAM . . . 2 Mad., 128

2. ——— **Collections of rent.**—*Claim to intermediate tenures.—Onus of proof.*—A zemindar has, as such, a *primâ facie* right to the gross collections from all the mouzahs within his zemindari. It is for parties setting up an intermediate tenure to prove their grant. PRAHLAD SEN *v.* DURGAPRASAD TEWARI
[2 B. L. R., P. C., 111 : 12 W. R., P. C., 6
12 Moore's I. A., 286

3. ——— **Right to rent.**—*Payment of revenue by zemindar.*—The right of a zemindar to exact from a tenant payment of rent for a certain piece of land, in no way depends on whether he does or does not pay revenue for that land. JOTENDRO MOHUN TAGORE *v.* AYMUN BEEBEE
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4. ——— **Liability for rent.**—*Co-sharer in talook.*—*Held* that a zemindar, by becoming a co-sharer in the talook, does not lose his right to the joint responsibility of all the other co-sharers for the due payment of the rent; he only becomes bound to make an allowance for that portion which he as a co-sharer ought to pay. GOBINDO COOMAR CHOWDHRY *v.* MANSON
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5. ——— **Compensation.**—*Compensation to putnidar for loss sustained by erection of works by railway company.*—A zemindar who receives his rents in full is not entitled to participate in compensation received by his putnidar for loss suffered by the latter in consequence of works being erected on land included in the putni. MAHARAJAH OF BURDWAN *v.* WOOMA SOONDUREE DOSSEE
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6. ——— **Sale in execution of decree.**—*Custom.—Charge on sale-proceeds.*—Where a sale took place in execution of a decree, and it was proved by custom that the zemindar's right extended to one fourth of the sale-proceeds in cases of involuntary sale,—*Held* that the zemindar had a right to recover the fourth share of the proceeds of sale from the judgment-creditor, who in truth reserved the sale price. The zemindar's right attached to the sale-proceeds, and was a prior charge upon the proceeds. BYJ NATH PERSHAD *v.* MAHOMED FUZL HOSSEIN
[2 Agra, Part II, 204

7. ——— *Custom.—Right to share of sale-proceeds.—Calculation of amount—Zemindari huq.*—Where by custom the zemindar is entitled to a quarter share of the sale-proceeds as his huq zemindari, he is entitled to recover it on the occasion of sales, either absolute or originally conditional, but subsequently becoming absolute by foreclosure, from the vendor and the purchaser, and the latter cannot be discharged from his liability by proving that he has paid all, including zemindar's dues, to the former, it being incumbent on him to see that the zemindar is satisfied in respect of his dues. *Held*, further, that, under the circumstances, the plaintiffs, the zemindars, were entitled to one fourth from R450, the principal amount repayable, and not from the amount ascertained at the time of foreclosure to be due to the mortgagee, including interest, inasmuch as the deed made no provision for payment of any sum as interest. HEERA RAM *v.* DEO NARAIN SINGH . Agra, F. B., 63 : Ed. 1874, 48

8. ——— *Sale in execution of house in mohalla.—Wajib-ul-urz.—Liability of auction-purchaser.—Right of zemindar to hug-i-chaharam.*—The zemindars of a certain mohalla claimed from the purchaser of a house situated in such mohalla, which had been sold in execution of a decree, one fourth of the sale-proceeds of such house, such purchaser being the holder of such decree. Such suit was based upon the terms of the wajib-ul-urz. That document stated, *inter alia*, that, when a house in such mohalla was sold, a cess called chaharam was received by such zemindars "according to the understanding arrived at between the seller and the zemindars." *Held* that such zemindars were not entitled under the terms of the wajib-ul-urz to one fourth of the sale-proceeds; that the decree-holder, because he happened to have become the auction-purchaser, could not be regarded as the "seller," and it was only the "seller" who was liable; that the terms of the wajib-ul-urz were applicable only to private and voluntary sales and not to execution-sales; and that, under these circumstances, the suit must be dismissed. BENI MADHO *v.* ZAHURUL-HAQ
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9. ——— **Sale of zemindar's right.**—*Right as tenant in another house.*—Where a zemindar's right is sold by auction, it does not follow that, by the sale of the zemindari right, he forfeits his tenant-right which he had in another putti in respect of a house. RAM BUKSH SINGH *v.* PURDUMUN KISHORE
[2 Agra, Part II, 202

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ZEMINDARI DAKS.

1. ——— **Beng. Act VIII of 1862.**—*Effect of Act on liability of putnidars.*—Bengal Act VIII of 1862 did not relieve putnidars from their liability under the old laws of paying the zemindari dak charges. BISSONATH SIRCAR *v.* SHURNOMOYEE [4 W. R., 6

2. ——— *Liability of putnidar.*—Where the terms of a putnee lease did not make the putneedar liable for the maintenance of the zemindari daks, it was held that the putnidar was not liable for a tax which was imposed on the zemindar by Bengal Act VIII of 1862. RAKHAL DOSS MOOKERJEE *v.* SHURNO MOYEE [6 W. R., 100

3. ——— *Liability of putnidar.*—The provision in a pottah that if any item is laid upon the zemindar over and above the sudder jumma, the putnidar shall bear a rateable proportion of it, held not to include the charges connected with the zemindari dak. ROHINEE KANT ROY *v.* TRIPOORA SOONDUREE DASSIA . 8 W. R., 45

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APPENDIX.

ABATEMENT OF SUIT.

——— *Appeal.—Civil Procedure Code, 1882, s. 366.—Application by legal representative to carry on appeal.*—The appellant's father having died during the pendency of an appeal lodged by him, a notice was served upon the appellant's two adult brothers; but they having failed to apply within sixty days, the appellant, who was a minor, applied several months afterwards to be put on the record in his deceased father's place as his legal representative, which was done. The Assistant Judge who heard the appeal was of opinion that, in consequence of the omission on the part of the brothers of the appellant to apply, the appeal abated, and he passed an order accordingly. *Held* that the application having been made by the minor son within the time limited by law, the order of abatement made by the Judge was wrong. Although the complete legal representation vested in the minor son and his two brothers, section 366 of the Civil Procedure Code (Act XIV of 1882) only required an application to be made by a person claiming to be the legal representative, in order to prevent an order of abatement being made. If neither of the brothers was willing to have his name placed on the record, the respondent was entitled to have them made defendants, so that they might be bound by the decree. The minor son could then proceed alone with the appeal. BHIKAJI RAMCHANDRA *v.* PURSHOTAM

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ABETMENT.

——— *Penal Code, s. 107.—Act I of 1879 (Stamp Act), s. 61.—Abetment of making an unstamped receipt.*—A debtor, having paid a sum of money to his creditor, accepted from the latter an unstamped receipt promising to affix a stamp thereto. *Held* that this did not constitute abetment, within the meaning of section 107 of the Penal Code, of the offence of making an unstamped receipt. *Empress* v. *Bahadur Singh, Weekly Notes, All., 1885, p. 30*, distinguished. *Empress* v. *Janki, I. L. R., 7 Bom., 82;* and *Empress* v. *Bhairon, Weekly Notes, All., 1884, p. 37*, referred to. QUEEN-EMPRESS *v.* MITTHU LAL . . . **I. L. R., 8 All., 18**

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See CASES UNDER APPROVER.

1. ——— **Corroboration.**—*Evidence of accomplices.*—It is an established rule of practice that an accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches. *Reg.* v. *Malapai, 11 Bom., 196;* and *Reg.* v. *Nanku, I. L. R., 1 Bom., 475*, followed. QUEEN-EMPRESS *v.* KRISHNABHAT

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2. ——— *Evidence of accomplices.*—Observations on the necessity of requiring corroboration, in material particulars, of the evidence of an accomplice. *Queen-Empress* v. *Ram Saran, I. L. R., 8 All., 306*, referred to. QUEEN-EMPRESS *v.* IMDAD KHAN . **I. L. R., 8 All., 120**

3. ——— *Evidence of accomplices.—Act I of 1872, ss. 114 (b), 133.*—The law in India, as expressed in section 133 and section 114 of the Evidence Act, and which is in no respect different from the law of England on the subject, is that a conviction based on the uncorroborated testimony of an accomplice is not illegal—that is, it is not unlawful; but experience shows that it is unsafe, and hence it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated, and, when trying a case with a jury, to warn the jury that such a course is unsafe. There must be some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. A second accomplice does not improve the position of the first, and, if there are two, it is necessary that both should be corroborated. The accomplice must be corroborated not only as to one but as to all of the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration. *R.* v. *Webb, 6 C. & P., 595; R.* v. *Dyke, 8 C. & P., 261; R.* v. *Addis, 6 P. P., 388;* and *R.* v. *Wilkes, 7 C. & P., 272*, referred to. The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder, though it would no doubt be corroboration of evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen property. In the trial of *R., S.*, and *M.* upon a charge of murder, the evidence (or the prosecution consisted of (i) the confession of *P.*, who was jointly tried with them for the same offence; (ii) the evidence of an accomplice; (iii) the evidence of witnesses who deposed to the discovery in *R.'s* house of property belonging to the deceased; and (iv) the evidence of witnesses who deposed that, on the day when the deceased was last seen alive, all the prisoners were seen together near the place where the body was afterwards found. *Held* that there was no sufficient corroboration of the statements of the accomplice or of the co-confessing prisoner *P.* QUEEN-EMPRESS *v.* RAM SARAN

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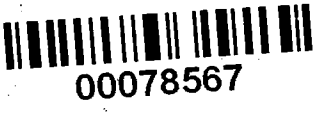
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